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DECISIONS AND OPINIONS

of the

UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON 25, D. C.

JANUARY 1955 - DECEMBER 1959

U.S. Dept. of Interior

AUTHOR

Alphabetical Index - Digest

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Decisions & opinions of U.S.

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WASHINGTON 25, D. C.

George W. Abbott, Solicitor

QUINQUENNIAL INDEX-DIGEST
JANUARY 1955 - DECEMBER 1959

This index-digest covers all the published and all the important unpublished decisions and opinions of the Department of the Interior for the period from January 1, 1955, through December 31, 1959. It supersedes the annual index-digests for January-December 1955, January-December 1956, January-December 1957, and January-December 1958, and the index-digest for January-September 1959.

Decisions and opinions cited as appearing in 62 I. D., 63 I. D., 64 I. D., 65 I. D., and 66 I. D. are published and copies may be obtained from the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C. Other decisions and opinions are unpublished and copies may be obtained from the Office of the Solicitor.

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SYMBOLS

A	- Appeal from Bureau of Land Management
CA	- Contract Appeal
IA	- Indian Appeal
IBCA	- Interior Board of Contract Appeals
M	- Solicitor's Opinion
T	- Tort Claim
T-(Ir.)	- Tort Claim - Irrigation
TA	- Tort Appeal
TA-(Ir.)	- Tort Appeal - Irrigation

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ACCOUNTS
(See also Funds)

FEES AND COMMISSIONS

The fee required by Revised Statutes, Section 2238, is inapplicable to a selection of public lands by the Territory of Alaska under the authority of the Alaska Mental Health Enabling Act. Nothing in this opinion should be construed as determining the applicability of Section 2238 to selections under any law other than the Alaska Mental Health Enabling Act.

Proposed Regulations Under the Alaska Mental Health Enabling Act, M-36371 (Oct. 30, 1956) 63 I. D. 350

PAYMENTS

Proceeds from leases for school sections reserved by the act of March 4, 1915 (48 U.S.C. 353), issued under the act of June 14, 1926, as amended (43 U.S.C. 869), should be deposited in the United States Treasury for payment annually to the Territory of Alaska.

School Sections Reserved by the Act of March 4, 1915 (38 Stat. 1214; 48 U.S.C. 353), For the Territory of Alaska, M-36243 (Feb. 8, 1955) 62 I. D. 22

Where the owner of contiguous land submits a timely preference-right claim for lands offered at public sale on the last day of the preference-right period and tenders his personal check which is later dishonored, the preference-right claim should be rejected.

John W. Roundy et al., A-27127 (Mar. 28, 1955) 62 I. D. 116

REFUNDS

The Department has no authority to refund the purchase price paid for land sold under the Alaska Public Sale Act where the purchaser fails to submit proof of the use of the land and an application for patent within the 3-year period prescribed by the statute.

Matanuska Valley Lines, Inc., et al., A-27197 (June 23, 1955) 62 I. D. 243

REFUNDS--Continued

There is no authority of law for refunding excess rentals paid for a right-of-way granted under section 5(c) of the act /Outer Continental Shelf Lands Act/ where the excess has been turned into the Treasury. Relief may be afforded by crediting the excess on future rentals as they become due.

Refund, Right-of-Way, M-36425 (Mar. 4, 1957)

An opinion by the Comptroller General that there is no authority for a repayment of the rentals paid on an oil and gas lease for land for which a mineral entry is later allowed and for which a patent is issued is binding upon the Secretary of the Interior.

L. N. Hagood et al., A-27657, A-27667, A-27681 (Sept. 29, 1958) 65 I. D. 405

Repayment of rentals paid on an oil and gas lease will not be made where a mineral patent is issued for lands embraced by the lease for the period prior to the issuance of the patent.

Duncan Miller, Union Oil Company of California, A-27727 (Dec. 9, 1958)

The Secretary of the Interior need not return moneys paid in connection with an oil and gas lease as a condition to cancellation of the lease.

A decision that a lease is to be canceled, standing by itself, is not a determination one way or the other that repayment of moneys paid in connection with the canceled lease is or is not to be made.

The authority of the Secretary to cancel an oil and gas lease is independent of the right of the lessee to a refund and the Secretary need not determine prior to or simultaneously with cancellation whether the lessee is entitled to a refund of moneys paid to the United States in connection with the lease.

Max Barash, The Texas Company, A-27239 (Supp. II) (Mar. 18, 1959) 66 I. D. 114

ACCRETION

It is proper to reject an oil and gas lease offer for accreted lands formed between the date of survey of the adjoining lot and the date of entry thereof where the United States patented the adjoining lot without an oil and gas reservation, the United States has filed a declaration of taking for the accreted area, and the United States has not appealed from a holding by the United States district court that title to such accretions, though substantial in amount, passed with the patent.

Edwin J. Keyser, A-27471 (May 20, 1957)

ADDITIONAL HOMESTEADS

An application for an additional homestead on a tract of Oregon and California revested grant land which is currently supporting timber valued at over $11,000 and is of mountainous topography, was properly rejected, since the tract appears more suitable for growing timber than for agricultural use.

William S. Maple, A-27120 (May 17, 1955)

ADMINISTRATIVE PRACTICE

Although an extension of an oil and gas lease is unauthorized and is subject to cancellation, it serves to segregate the land and prevent other filings until the cancellation is effected and noted on the land office records.

John J. Farrelly et al., A-27068 (Jan. 7, 1955) 62 I. D. 1)

A statement by the Acting Director, Bureau of Land Management, in a decision approving an application for public sale of an isolated tract, that the grazing lessee on that tract would be given personal notice of the time and place of the sale (apart from the usual general notice by publication and posting) was properly construed as the extension of a courtesy and not as the conferring of a right, there being no law or regulation requiring such personal notice.

Henry Petz, Mary B. Wilson, Administratrix of the Estate of Frank H. Wilson, A-27017 (Feb. 11, 1955) 62 I. D. 33

ADMINISTRATIVE PRACTICE--Continued

The report of a field examination, although a proper basis for charges, notice, and a hearing, is not evidence on which the final action of cancellation of a desert land entry may be taken.

A desert land entry is not to be canceled for defects not appearing on the face of the record without giving the entryman an opportunity to be heard.

Claude E. Crumb, A-26930 (Mar. 21, 1955) 62 I. D. 99

Where a decision authorizing the issuance of a 2-year grazing lease to applicants having a contractual preference right to a renewal of the lease is open to question, the decision will not be disturbed where the applicants have had use of the land applied for pending final action on their application and the term of such 2-year lease will expire within a very short time.

G. Phil Kent et al., A-27039 (Mar. 23, 1955)

Where notice of a public sale of an isolated tract has been given by publication and posting, the sale will not be set aside because one of several applicants for the sale did not receive personal notice of the sale.

A public sale of an isolated tract will not be set aside because the sale was held while a small tract application for part of the land was pending on appeal where the appeal is disposed of prior to final action having been taken on the public sale.

James J. Kendrew, A-27145 (April 8, 1955)

Where three or more oil and gas lease offers wholly or partially covering the same lands are filed simultaneously, necessitating a public drawing to determine the priority of preference, fraud on the part of one or more of the offerors, or collusion on the part of two or more of the offerors, aimed at unfairly enhancing the mathematical probabilities of success in the drawing for those offerors, will result in the total rejection of the offers involved in the fraud or collusion.

Where several oil and gas lease offers wholly or partially covering the same lands are filed simultaneously, necessitating a public drawing to determine the priority of preference, a partial duplication of land in two offers by the

ADMINISTRATIVE PRACTICE--Continued

same offeror will not result in the total rejection of either offer if there is no evidence that the duplication was the result of a deliberate effort on the part of that offeror to enhance the mathematical probabilities of his success in the drawing.

Where a decision of a land office manager contains a questionable ruling on a particular legal issue, but the party adversely affected, though apprised of his remedy to appeal, fails to do so, there is no need, in the appeal to the Secretary of a subsequent, collateral case, to decide such legal issue if it is not necessarily involved in a proper disposition of the appeal at hand. Moreover, in such circumstances the importance of administrative finality cannot be disregarded.

Eugene J. Bernardini, Albert Chester Travis, A-27093 (June 20, 1955) 62 I. D. 231

There is no requirement that an award of land offered at public sale can be made to a preference-right claimant only after a hearing has been held for receiving evidence in support of and in opposition to the preference-right claim.

Howard M. Wilson, The Navajo Tribe, A-27233 (Jan. 23, 1956) 63 I. D. 36

A small tract application is properly rejected where an application for the land was filed prior to the time the rejected application was filed and a lease was issued to the prior applicant, the issue of priority of filing having been determined in accordance with administrative rules adopted by the land office to assure fairness in establishing the time of filing applications.

Everta P. Ericson, A-27264 (Mar. 12, 1956)

An administrative practice by a land office which is clearly in contravention of an applicable regulation cannot be the basis for creating any rights in an applicant.

Ralph J. Fuchs, A-27295 (Mar. 27, 1956)

Although in general a contractor who has taken an appeal should be prepared to substantiate the claim before the Board with reasonable promptness, and should not, indeed, present the

ADMINISTRATIVE PRACTICE--Continued

claim unless he has reason to suppose that it is meritorious, the Board will grant a request of the contractor that consideration of the claim by the Board be deferred pending the outcome of litigation between the contractor and his subcontractor when counsel for the Government does not object, and it appears from the nature of the claim that the interests of the Government will not be prejudiced. Although the present case will be marked "closed" on the Board's docket, the contractor may file a request that it be reopened, within a reasonable time after the determination of the litigation in which it is involved.

Appeal of Osberg Construction Company, IBCA-32 (June 19, 1956) 63 I. D. 180

Where an applicant is to be deprived of a statutory preference right because of his failure to comply with the requirements of a regulation, that regulation should be so clear that there is no basis for the applicant's noncompliance therewith.

Donald C. Ingersoll, A-27306 (Dec. 5, 1956) 63 I. D. 397

Where a legal subdivision has been withdrawn as oil shale land and only part of the subdivision is determined to be oil shale land, the remainder of the subdivision will not be restored from the withdrawal in view of the established practice not to dispose of public lands in less than smallest legal subdivisions.

Rea L. Eaton, A-27377 (Mar. 18, 1957)

The Director of the Bureau of Land Management may, before an appeal is taken to the Secretary, reconsider a previous decision on his own motion and correct any errors that may have been made in the former decision.

Ruby E. Huffman, Frances Torres, and Beulah Mae Choquette, A-27373 (Mar. 21, 1957) 64 I. D. 57

A suit pending in a State court based upon an asserted prior appropriation of a mining claim and amounting to an adverse claim against an application for mineral patent is not a judicial proceeding under section 2326 of the Revised Statutes which will stay action of the Department on the application for patent where the adverse claim was not filed in the land office within the time required by statute.

Seymour Gray et al. v. Milner Corporation, A-27431 (Aug. 21, 1957) 64 I. D. 337

ADMINISTRATIVE PRACTICE--Continued

Good administrative practice requires that when land is classified for disposal in a manner which precludes the allowance of applications for the land previously filed those applications be rejected immediately and sufficient time be permitted to elapse to allow the applicants to take appeals from the adverse classification before action is taken by the local office which will result in rights attaching to the classified land under later applications.

State of California et al., A-27507 (Dec. 13, 1957) 64 I. D. 459

It is proper for the Eastern States Office of the Bureau of Land Management, on its own motion, to reconsider its decisions prior to an appeal to the Director, even though there are adverse rights present.

Humble Oil and Refining Company, A-27568 (May 29, 1958) 65 I. D. 257

Where one who was not a party to a decision by the Acting Director of the Bureau of Land Management, but who should have been made a party to the decision, had notice of the decision and appealed therefrom to the Secretary, his appeal will be considered on its merits and a motion to dismiss the appeal because of the appellant's lack of standing as a party to the proceedings will be dismissed.

Godfrey Nordmark, A-27602 (July 21, 1958) 65 I. D. 299

Where there is a dispute between the parties to a transfer of interests in an oil and gas lease as to whether the transfer constitutes an assignment of record title or an operating agreement, the Department will not approve the transfer until the dispute is resolved by the parties or the courts.

Richfield Oil Corporation, A-27603 (Aug. 18, 1958) 65 I. D. 348

A public sale applicant is not entitled as a matter of right to a hearing for determining the proper classification of the land for which he applied.

Paul B. and Ruth M. Butler, A-27634 (Aug. 26, 1958)

ADMINISTRATIVE PRACTICE--Continued

When the cancellation procedure prescribed by a lease contract provides that the lessee may request a hearing within a specified period after a day named, the designated day after which the period of time begins to run is not to be included in the computation. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday.

Where a contract requires notice within a specified period, but does not specify the manner in which notice is to be given, the mere mailing of notice is not sufficient unless it is received within the time specified.

Uranium Exploration Company of California, IA-913 (Aug. 26, 1958) 65 I. D. 365

Where the Department places a different interpretation on an act of Congress from that previously adopted, its decision announcing the new interpretation of the statute is to be given prospective application only and actions previously taken in extending oil and gas leases under the overruled interpretation of the statute will not be disturbed.

Franco Western Oil Company et al., A-27607 (Supp.) (Sept. 30, 1958) 65 I. D. 427

The Director of the Bureau of Land Management may at any time assume jurisdiction over and dispose of a matter pending in a land office at any stage of the proceeding.

The Director of the Bureau of Land Management may, before an appeal is taken to the Secretary of the Interior, reconsider his previous decision on his own motion and correct any error that may have been made in it.

Richfield Oil Corporation, A-27697 (Oct. 23, 1958)

Where subsequent to the approval by the Department of an assignment of interests in an oil and gas lease at the request of the assignee it appears that there is such a dispute between the parties as to the intent and purpose of the assignment instrument that, had the Department known of the dispute the Department would not have acted on the purported assignment until the dispute between the parties has been resolved by the courts or the parties themselves, the Department will not rescind the

approval but will not approve further assignments of rights stemming from the disputed assignment or permit drilling by any one claiming operating rights deriving from the disputed assignments for a period of time sufficient to permit the parties a chance to settle their dispute by agreement or litigation.

Newton Oil Company et al., A-27662 (Dec. 17, 1958)

A protestant against an application for a survey of islands erroneously omitted from the public land survey can submit whatever evidence he deems pertinent in support of his protest, but there is no requirement that a formal hearing be held.

Willis W. Ritter et al., A-27755 (Dec. 22, 1958)

Where the Director of the Bureau of Land Management has finally disposed of a matter, a subordinate official is without jurisdiction to take any action with respect to it except upon the instruction of the Director.

State of Louisiana, Thomas Connell, A-27817 (Jan. 30, 1959)

As a matter of administrative practice the Department may, subject to valid intervening applications, permit oil and gas lease applications for acquired lands which were defective when filed to be processed as though the defect had been corrected by the applicant when, by reason of the amendment of a regulation after the application was filed, the application is no longer defective.

Nettie M. Lewis et al., A-27848 (Mar. 3, 1959)

The rule that land will not be disposed of in less than the smallest legal subdivision is a rule of administrative convenience, and an award of less than a legal subdivision may be made where the particular circumstances warrant such action.

Charles O. Miller, Joseph H. Greenhalgh, A-27822 (Mar. 4, 1959)

Where there has been no adjudication of commensurability of base property during the priority period and the earliest commensurability report in the official grazing files was not based on a dependent property survey, the commensurability rating of the base during the priority period will not be conclusively presumed to be that shown by the earliest commensurability report if there is other evidence in the

record inconsistent with that report and the applicant whose grazing privileges are affected thereby requests an opportunity to submit evidence on the question.

Arthur V. Heller, A-27833 (Mar. 9, 1959) 66 I. D. 65

A settler who files a notice of location of settlement or occupancy on land in Alaska is not entitled to a hearing as a matter of right when his notice is rejected for conflict with an outstanding entry.

Edward W. Harrington, A-27823 (Jun. 15, 1959)

The determination of the proper classification of land under section 7 of the Taylor Grazing Act, as amended, is discretionary with the Secretary of the Interior and there is no requirement of law that such a determination shall be based upon a record compiled at a hearing, but applicants for entry of land which is subject to classification under section 7 may submit evidence in support of their applications, which evidence is considered in classifying the land.

Max J. Curtis, A-27843 (Aug. 11, 1959)

After an appeal is taken to the Director from a decision of a land office manager, jurisdiction over the case is in the former and the latter has no authority to act upon it.

Audrey I. Cutting, George Peter Smith, A-28031 (Oct. 8, 1959) 66 I. D. 348

ADMINISTRATIVE PROCEDURE ACT

GENERALLY

The definition of the known geologic structure of a producing oil or gas field is not an "interpretation formulated and adopted by the agency for the guidance of the public" within the meaning of section 3(a)(3) of the Administrative Procedure Act and it is effective without publication in the Federal Register.

Max Barash, The Texas Company, A-27239 (Feb. 14, 1956) 63 I. D. 51

ADMINISTRATIVE PROCEDURE ACT--Continued

ADJUDICATION

Where the Secretary of the Interior is vested by law with the discretionary power to issue mineral permits and leases when he deems such action to be in the public interest, ad hoc decisions may be made respecting any pending application which is contrary to law or the policy of Congress as expressed in its acts, or which the Secretary in his discretion deems not in the public interest because conducive to a violation of the anti-monopoly laws with respect to applications for mineral permits or leases at least where the applicants do not have a vested right under an existing regulation to receive a permit or lease.

Retroactive Application of Acreage Limitation Provision of Regulation Approved August 11, 1955 (Circular No. 1919; 43 CFR 200.31-200.50), M-36321 (July 29, 1957)

The processing of applications for private exchanges or of protests against them is not subject to the provisions of the Administrative Procedure Act relating to adjudications.

J. D. Critchlow et al., A-27907 (Aug. 4, 1959)

DECISIONS

A decision declaring a mining claim null and void will be affirmed where the decision is based on substantial evidence submitted at a hearing held in accordance with the provisions of the Administrative Procedure Act and presided at by an examiner qualified under the act, and there was no error in the conduct of the proceeding or in the decision invalidating the claim.

United States v. Keith V. O'Leary et al., A-27791 (Jan. 21, 1959) 66 I. D. 17

EXEMPTION FROM

A coal land lessee is not entitled to a hearing under the Administrative Procedure Act on the necessity for or terms of the grant of a right-of-way across its lease and the joint use of its roads.

A. Ben Shallit, Usibelli Coal Mine, Inc., A-27314 (July 9, 1956) 63 I. D. 193

ADMINISTRATIVE PROCEDURE ACT--Continued

EXEMPTION FROM--Continued

A mining claimant is not entitled to a hearing under the Administrative Procedure Act on the validity of the claim where it appears on the face of the record that the claim is invalid because the mining location was made at a time when the land included in the claim was embraced in an existing oil and gas lease issued under the terms of the Mineral Leasing Act, and the mining claimant had failed to comply with the provisions of the act of August 12, 1953. United States v. Keith V. O'Leary et al., 63 I. D. 341 (1956), distinguished.

Clear Gravel Enterprises, Inc., A-27449 (May 31, 1957) 64 I. D. 210

The establishment and permitting of grazing units from restricted tribal and allotted Indian lands does not come under the purview of the Administrative Procedure Act.

A. J. Barta, John E. Barta and Charles K. Failing, IA-977 (Nov. 24, 1958)

Applicants for lands selected under the soldiers' additional homestead law are not entitled to a hearing under the Administrative Procedure Act where the right of the applicant to select an additional entry is recognized and the sole issue is whether the lands selected can be properly classified as suitable for selection under the law.

Ferris F. Boothe, A-28058 (Nov. 23, 1959) 66 I. D. 395

HEARINGS

In a hearing on the propriety of a range manager's notice canceling an outstanding 10-year grazing permit, the Government has the burden of proof.

Frank Halls, A. J. Redd, A-27133 (Sept. 8, 1955) 62 I. D. 344

The provisions of the Administrative Procedure Act relating to hearings are not applicable to proceedings before the Department involving the right of the Department to determine whether an island was omitted from the original survey and to issue an oil and gas lease for such island.

Northern Pacific Railway Company, Ralph L. Bassett, A-27114 (Oct. 20, 1955) 62 I. D. 401

ADMINISTRATIVE PROCEDURE ACT--Continued

HEARINGS--Continued

A protestant against a private exchange application is not entitled as a matter of legal right to a hearing on matters relating to the allowance of the application.

Glenera Sheehan Hunter et al., A-27267 (Feb. 29, 1956)

Failure of the range manager to state, in the notice of adverse action upon an application, all of the reasons upon which the action is based is contrary to departmental regulation and, in hearings cases, may violate the provision in the Administrative Procedure Act which requires that persons entitled to notice of an agency hearing shall be timely informed of the matters of fact and law asserted; but the defect is not a basis for modifying the outcome of a proceeding which is now moot.

M. F. Sullivan et al., A-27329 (Aug. 20, 1956) 63 I. D. 269

The courts have held that administrative proceedings in which a hearing is necessary in order to satisfy the requirements of due process must comply with the Administrative Procedure Act, even though there is no statute requiring that the matter be determined on the record after opportunity for an agency hearing, and proceedings to determine the validity of mining claims will be held in compliance with that act.

United States v. Keith V. O'Leary et al., A-27260 (Sept. 28, 1956) 63 I. D. 341

Although a range manager's decision on an application for grazing privileges may satisfy the requirements for a notice of hearing under the Administrative Procedure Act, such a decision does not constitute a notice of hearing under the Administrative Procedure Act and a hearing which is held on the applicant's appeal from the range manager's decision is not in violation of the Administrative Procedure Act because the decision does not conform to the requirements for a notice of hearing imposed by the Administrative Procedure Act.

In an administrative proceeding, the strict common law rules of evidence do not apply and the fact that hearsay evidence is admitted will afford no basis for ordering a new hearing.

Although it has been held that under section 7(c) of the Administrative Procedure Act, an administrative finding cannot be based upon hearsay alone or hearsay corroborated only by a scintilla of evidence, it is questionable

ADMINISTRATIVE PROCEDURE ACT--Continued

HEARINGS--Continued

whether this principle applies to hearings in grazing cases in view of the fact that the hearings are held only on appeals and the appellant has the burden of proof.

E. L. Cord, DBA El Jiggs Ranch, A-27426 (June 25, 1957) 64 I. D. 232

The Administrative Procedure Act does not require the holding of hearings in mining cases where the facts are not in dispute and the validity of a claim presents solely a legal issue; therefore a hearing is not required before holding mining claims to be null and void because at the time they were located the lands were included in outstanding small tract leases.

The Dredge Corporation, A-27429 (Supp.) (Aug. 14, 1958) 65 I. D. 336

The Administrative Procedure Act does not require that parties to a hearing be given the right to submit exceptions to a recommended decision of the hearing examiner but permits an agency to adopt the alternative procedure of giving the parties the right to submit proposed findings of fact and conclusions of law before the examiner's decision is issued.

United States v. Vincent Creek Gold and Copper Company, A-27703 (Nov. 5, 1958)

A settler who files a notice of location of settlement or occupancy on land in Alaska is not entitled to a hearing as a matter of right when his notice is rejected for conflict with an outstanding entry.

Edward W. Harrington, A-27823 (Jun. 15, 1959)

Applicants for lands selected under the soldiers' additional homestead law are not entitled to a hearing under the Administrative Procedure Act where the right of the applicant to select an additional entry is recognized and the sole issue is whether the lands selected can be properly classified as suitable for selection under the law.

Ferris F. Boothe, A-28058 (Nov. 23, 1959) 66 I. D. 395

ADMINISTRATIVE PROCEDURE ACT--Continued

HEARINGS EXAMINERS

Where a contestee does not object to the fact that the hearing officer was not appointed in accordance with the provisions of the Administrative Procedure Act until the case is on appeal to the Secretary, the objection is not timely and does not require that the proceedings be set aside.

Assuming that an objection to a hearing officer (that he was not appointed in accordance with the Administrative Procedure Act) would be timely if made for the first time on an appeal to the Director of the Bureau of Land Management, failure to raise the objection at that time will constitute a waiver of the objection.

United States v. Alonzo A. Adams et al., A-27364 (June 3, 1957) 64 I. D. 221

A decision declaring a mining claim null and void will be affirmed where the decision is based on substantial evidence submitted at a hearing held in accordance with the provisions of the Administrative Procedure Act and presided at by an examiner qualified under the act, and there was no error in the conduct of the proceeding or in the decision invalidating the claim.

United States v. Keith V. O'Leary et al., A-27791 (Jan. 21, 1959) 66 I. D. 17

LICENSING

The cancellation of a grazing permit without according the permittee an opportunity to demonstrate or achieve compliance with lawful requirements is unlawful under section 9(b) of the Administrative Procedure Act except in cases of willfulness or those in which the public health, interest or safety requires otherwise; the departmental regulation that a decision canceling a grazing permit will not become effective pending disposition of a timely appeal precludes the possibility of such a decision coming within the scope of the exception clause in section 9(b) of the Administrative Procedure Act.

Frank Halls, A. J. Redd, A-27133 (Sept. 8, 1955) 62 I. D. 344

RULE MAKING

The provisions of section 4 of the Administrative Procedure Act relating to rule making do not apply to a special rule issued under the Federal Range Code and applicable to the range

ADMINISTRATIVE PROCEDURE ACT--Continued

RULE MAKING--Continued

in a particular district because the rule involves use of the Federal range which is public property, and matters relating to public property are expressly excepted from the provisions governing rule making in section 4 of the Administrative Procedure Act.

Wade McNeil et al., A-27439 (Nov. 19, 1957) 64 I. D. 423

AGENCY

Where applicants to purchase land under a small tract lease deposited the application and purchase money in escrow with a bank and directed the bank to file the application within a certain time and the bank delayed the filing beyond the time specified, the applicants must suffer whatever consequences result from the action of their agent.

Albert H. Dobry, George H. Borovay, A-27387 (May 8, 1957) 64 I. D. 116

The burden of proving agency is upon the party asserting it.

To create an agency it is fundamental that there must be consent, express or implied, by both principal and agent that the relationship of agency shall exist.

Where an oil and gas lessee applies for an extension of his entire lease despite the fact that he had previously assigned a portion of his lease to another and the assignment has been approved, he will not be considered to be the agent of the assignee in applying for the extension where there is no proof that he was designated as the assignee's agent and the circumstances surrounding his applying for the extension not only fail to show that he was acting as agent but show a situation inconsistent with the concept of agency.

Where an oil and gas lessee applies for an extension of his entire lease despite the fact that he had previously assigned a portion of his lease to another and the assignment has been approved, he will not be considered to be an apparent or ostensible agent for the assignee in applying for the extension where there is no evidence that the lessee has ever been held out to be an agent of the assignee.

AGENCY--Continued

A principal cannot have an agent do what the principal cannot do himself.

Earl C. Hartley et al., A-27437, A-27446 A-27447 (Jan. 13, 1958) 65 I. D. 12

Where an informal application for an extension of a noncompetitive oil and gas lease is timely filed by a person who is shown on appeal to have acted in behalf of the record titleholder as his agent, the application for extension may be considered to have been properly filed and the lease may be extended if all other requirements are met.

D. J. Dowd, A-27956 (Jun. 26, 1959)

An assignee not of record in the land office who offers to pay the rent for the sixth year of a 5-year noncompetitive oil and gas lease is properly not considered as an agent of the record titleholder for the purpose of requesting extension of the lease in view of the complete absence of any evidence to show agency and assertions by the assignee and the record titleholder in their subsequent communications with the land office which are incompatible with an agency relationship.

Ben Sapir et al., A-28042 (Oct. 26, 1959)

ALASKA

GENERALLY

The restrictions on Territorial borrowing in 48 U.S.C. sec. 77 apply only to obligations which the Territory is bound to satisfy out of its funds. Since, under sections 1201 and 1202 of the Social Security Act (Public Law 567, 83d Cong., 68 Stat. 668), the Territory would not be required to use its funds to repay an advance from the Unemployment Trust Fund, the acceptance of such an advance would not be an assumption of indebtedness within the meaning of 48 U.S.C. sec. 77.

The inclusion of Alaska within the ambit of the Social Security Act has freed the Territory pro tanto from any restriction against accepting advances from the Unemployment Trust Fund established under that act which might otherwise have been contained in 48 U.S.C. sec. 77.

Advances to Alaska From Unemployment Trust Fund, M-36262 (Feb. 10, 1955)

ALASKA--Continued

GENERALLY--Continued

The Secretary of the Interior has authority under the provisions of the act of June 6, 1924 (43 Stat. 464; 48 U.S.C. 221 et seq.), to prescribe the maximum number or type of boats or fishing gear that may fish within a designated fishing area in the waters of Alaska. He also may stipulate the area or areas within which a particular boat or gear will be permitted to fish. He also may require that each boat or type of gear be licensed and may fix a reasonable fee to be paid for any required license.

Act of June 6, 1924 (43 Stat. 464), M-36276 (April 22, 1955)

The act of August 12, 1954 (68 Stat. 698; 16 U.S.C. 1021 et seq.), authorizes the Secretary of the Interior to regulate the taking of salmon and herring on the high seas in areas contiguous to the territorial waters of Alaska.

Act of August 12, 1954 (68 Stat. 698), M-36273 (April 22, 1955)

The Territory of Alaska may obtain surplus personal property without reimbursement under Public Law 659, 83d Congress (68 Stat. 794).

Transfer of Excess Property and Disposition of Surplus Property to the Territories and the Trust Territory of the Pacific Islands, M-36222 (Sept. 29, 1955)

The proposed Alaska constitution, article XV, section 10, should not be construed to require that any candidate for the Senate of the United States is to be elected for a term of less than 6 years.

Classification of the First Senators From the State of Alaska in Regard to their Initial Term of Office, M-36522 (July 30, 1958)

Where a statute does not specifically refer to Alaska, the question whether such statute may nevertheless operate in Alaska depends on whether it may operate therein consistently with special legislation and with local conditions, or whether it is a statute "locally inapplicable" within the meaning of section 3 of the act of August 24, 1912 (37 Stat. 512; 48 USC 23) establishing the judicial and executive departments in Alaska.

Applicability to Alaska of the Stock-Raising Homestead Act of December 29, 1916 (39 Stat. 862; 43 USC 291-301) as Amended, M-36537 (Nov. 25, 1958)

ALASKA--Continued

GENERALLY--Continued

The legislative history of section 20 of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), makes it clear that the act revoked the withdrawals of coal land made under authority of section 2 of the act of October 20, 1914 (38 Stat. 742; 48 U.S.C., sec. 433).

Proposed Public Land Order Opening Coal Reserves in Alaska, M-36572 (Aug. 20, 1959)

Administration of leases for the cultivation of oysters given under the act of August 2, 1937 (50 Stat. 557; 48 U.S.C., 1952 ed., sec. 223b) authorizing the Secretary of the Interior to lease bottoms in Alaskan waters for the cultivation of oysters is one of the functions retained by the Secretary of the Interior under the provisions of section 6(e) of the Alaska Statehood Act (72 Stat. 339) until January 1, 1960, the first day of the first calendar year following the expiration of 90 calendar days after certification by him that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of the fish and wildlife resources of Alaska.

Administration of Leases of Oyster Bottoms in Alaska Waters, M-36579 (Oct. 5, 1959)

ALASKA RAILROAD

The Secretary of the Interior has authority under the provisions of the act of March 12, 1914 (38 Stat. 305; 48 U.S.C. sec. 301 et seq.), to establish through rates which are different from local rates applicable to intermediate points and to establish rates for freight shipped from ports in the States via steamship and the Alaska Railroad.

Alaska Railroad Freight Rates, M-36317 (Jan. 19, 1956) 63 I. D. 33

COAL LEASES AND PERMITS

The Secretary of the Interior may grant one coal lessee a right-of-way over the lands leased to another coal lessee and may allow the former to use jointly with the other a road constructed by the latter upon suitable terms and conditions.

A. Ben Shallit, Usibelli Coal Mine, Inc., A-27314 (July 9, 1956) 63 I. D. 193

ALASKA--Continued

COAL LEASES AND PERMITS--Continued

Section 8(d) of the act of July 7, 1958 (72 Stat. 339), the Alaska Act of Admission into the Union as a State, when it provided that all of the laws of the United States shall have the same force and effect within the State of Alaska as elsewhere within the United States included in those laws, laws that apply only to Alaska at the time of its admission as a State and where as of that time a special law applicable only to Alaska covers the whole of any particular field which is also covered by a general law, the special law will continue to operate rather than the general law, by the force of the provisions of section 8, unless repealed in terms or by clear implication. Thus the Alaska Coal Leasing Act of October 20, 1914 (38 Stat. 741; 48 U. S. C., sec. 32) continues to be the law applicable to the disposition of coal deposits belonging to the United States and the coal leasing provisions of the act of February 25, 1920, do not apply to them.

Applicability of the Coal Leasing Provisions of the Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 181 et seq.) as Amended, to the State of Alaska, M-36551 (Feb. 4, 1959)

An application for a coal prospecting permit is properly rejected where the lands applied for are subject to leasing rather than to prospecting.

Wilbur C. Allen, A-27857 (Feb. 27, 1959)

GRAZING

Where the time for complying with certain requirements of a grazing lease has been extended for a "reasonable time," it is improper for the land office manager to hold the lease for cancellation prior to the expiration of a reasonable time for compliance.

Leo W. Winter, A-27097 (May 25, 1955)

Lands included in grazing leases issued under the act of March 4, 1927 (48 U.S.C. secs. 471, 471a-471o), are deemed to be appropriated and segregated from the remainder of the public domain in Alaska. Where leased lands are included in an application for other use or disposal, such application may be allowed, under 43 CFR 63.18, upon a finding by the appropriate officer that the allowance is in the public interest or will not unduly interfere with the use of the remaining leased area for grazing purposes. The authority to "classify," i.e. to determine whether

ALASKA--Continued

GRAZING--Continued

the desired leased lands are suitable for the purpose indicated in such disposal application, follows as a necessary corollary.

Alaska Grazing Act of March 4, 1927 (48 U.S.C. secs. 471, 471a-471o); Authority of Secretary to "Classify" Leased Lands for Disposal, M-36454 (July 23, 1957)

HEADQUARTERS SITES

The first proviso to section 10 of the act of May 14, 1898, applies to mutually exclusive classes of persons: those who are employed by others engaged in trade, manufacture, or other productive industry, and those who are not so employed but are engaged on their own behalf in trade, manufacture, or other productive industry

An Alaska headquarters site application will be rejected where the applicant is not engaged on his own behalf in trade, manufacture, or other productive industry and relies solely upon his employment as a construction engineer, land surveyor, and draftsman by the United States Air Force to meet the requirements for a headquarters site.

One who is employed by the United States Air Force does not come within the category of persons "employed by citizens of the United States, associations of such citizens, or by corporations organized under the laws of the United States, or of any State or Territory."

Willis Hight Morris, A-27273 (May 7, 1956)
63 I. D. 117

Where an applicant's notice of location of settlement of an Alaska headquarters site is rejected on the ground that the land involved has been classified for disposal under the Small Tract Act and therefore is not subject to other forms of entry, but the manager allows the appellant the right to either appeal his decision or file a small tract application, and the applicant does not appeal but instead files a small tract application which is junior in time to another small tract application, the appellant by failing to appeal from the manager's decision thereby waived any rights he may have had under his location notice and the land will be awarded to the first qualified small tract applicant.

William D. Cunningham, Alice F. McGrath, A-27297 (May 28, 1956)

ALASKA--Continued

HOMESTEADS

A notice of location of settlement or occupancy claim on unsurveyed land in Alaska is properly rejected where the land applied for is withdrawn from all forms of appropriation under the public land laws before the locator has made any improvements or established residence on the land.

Anne V. Hestnes, A-27096 (June 27, 1955)

Where one applies for a survey of a homestead claim, only a portion of the claim is surveyed, and the applicant then applies to enter only the surveyed portion and submits final proof on and accepts a patent only for such portion, all without objection other than an alleged verbal objection to the surveyor, he must be deemed to have waived or abandoned any rights to the remainder of the claim and cannot 4 years later file a notice of location of settlement for that land.

Lafe L. Hufman, A-27272 (Mar. 12, 1956)

The act of March 8, 1922 (42 Stat. 415; 48 U. S. C. secs. 376, 377), is applicable to homestead applications, settlement claims, or entries where the lands covered thereby are reported by the Geological Survey as either valuable, or prospectively valuable for coal, oil or gas.

The act of March 8, 1922 (42 Stat. 415; 48 U. S. C. secs. 376, 377), constitutes an extension to the Territory of Alaska of the principles of the surface homestead acts in force in the public land States, namely, the acts of March 3, 1909 (35 Stat. 844; 30 U. S. C. sec. 81), June 22, 1910 (36 Stat. 583; 30 U. S. C. secs. 83-85), and July 17, 1914 (38 Stat. 509; 30 U. S. C. secs. 121-123). Therefore, the procedure set out in 43 CFR 66 and 43 CFR 102. 22 should be followed.

The words "before the date of issuance of a final certificate" in the act of March 8, 1922 (42 Stat. 415; 48 U. S. C. secs. 376, 377), should be construed to mean "before the date of earning of equitable title."

So far as the mineral reservation provisions of the act of March 8, 1922 (42 Stat. 415; 48 U. S. C. secs. 376, 377), are concerned, it is immaterial whether a mineral lease application or permit application was filed prior or subsequent to the filing of a homestead application or to the initiation of a settlement claim, conflicting with the mineral application. Priority determines whether the last paragraph of 43 CFR 66. 2(b) or 43 CFR 66. 6 applies.

ALASKA--Continued

HOMESTEADS--Continued

A report from the Geological Survey that land covered by a homestead application, settlement claim, or entry is prospectively valuable for one of the minerals named in the act of March 8, 1922 (42 Stat. 415; 48 U. S. C. secs. 376, 377), is sufficient, unless satisfactory final proof on the entry has been submitted, to warrant requiring the applicant, settler, or entryman, respectively, to consent to a reservation of that mineral or to assume the burden of proving that in fact the land is nonmineral in character.

The applicant's, settler's or entryman's consent is required before a homestead application, settlement claim, or entry, respectively, may be impressed with a mineral reservation under the act of March 8, 1922 (42 Stat. 415; 48 U. S. C. secs. 376, 377).

If when an entry impressed with a mineral reservation under the act of March 8, 1922 (42 Stat. 415; 48 U. S. C. secs. 376, 377), is ready for patent, the current report of the Geological Survey is that the lands have no value or prospective value for the mineral reserved and there is then an outstanding mineral lease or permit, the patent may be issued without the mineral reservation but excepting from the lands being patented the mineral covered by the lease or permit, the exception to be effective only so long as the lease or permit and rights thereunder exist.

If the Geological Survey reports after the date of submission of satisfactory final proof on an entry not impressed with a mineral reservation under the act of March 8, 1922 (42 Stat. 415; 48 U. S. C. secs. 376, 377), that the land is "coal, oil or gas in character" (mineral in character), the entryman cannot be compelled to consent to such a reservation unless the Government contests the entry and proves that before such date the land was known to be of that character. The contest cannot be based on a charge that the lands were known before that date to be "prospectively valuable" for coal, oil or gas.

Act of March 8, 1922 (42 Stat. 415; 48 U. S. C. Secs. 376, 377), M-36483 (Jan. 27, 1958)
65 I. D. 39

A notice of location of a homestead settlement on public lands in Alaska is properly rejected where the land involved is withdrawn from settlement, location, sale and entry, and reserved for classification.

Eugene T. Meyer, A-27729 (Dec. 17, 1958)

ALASKA--Continued

HOMESTEADS--Continued

A notice of location of a settlement or occupancy claim is properly rejected to the extent that it conflicts with a prior outstanding Indian allotment which was approved by the Department.

Edward W. Harrington, A-27823 (Jun. 15, 1959)

A noncompetitive oil and gas lease application is properly rejected where the lands applied for are embraced in settlement claims in Alaska which were classified as not prospectively valuable for oil and gas prior to the filing of satisfactory final proof, and no showing is made that the lands involved were known to be mineral in character prior to the filing of final proof.

Fred Axford, A-27933 (Jun. 29, 1959)

An application for a stockraising homestead in Alaska is properly rejected on the ground that the statute authorizing allowance of stockraising homesteads is not applicable to Alaska.

Yule Kilcher, A-28013 (Aug. 10, 1959)

A notice of location of a homestead settlement on public lands in Alaska is properly rejected where the land involved is included in a powersite reserve.

Bessie G. Stevens, A-28039 (Aug. 25, 1959)

INDIAN AND NATIVE AFFAIRS

The act of August 23, 1950 (64 Stat. 470), which provides for conveyances of land and improvements no longer required for school or other public purposes, does not apply to the Metlakatla Indian Reservation because the lands are not within the public domain.

Proposed Transfer of School Buildings in Alaska to Metlakatla Indian Community, M-36324 (Jan. 11, 1956)

There is no Federal law which prohibits the Territory of Alaska from creating school districts in territory set aside for Alaskan Indians.

Organization of School Districts on Indian Reservations in Alaska, M-36367 (Sept. 17, 1956)
63 I. D. 333

ALASKA--Continued

INDIAN AND NATIVE AFFAIRS--Continued

Section 4 of the Alaska Statehood Act, which provides for the retention by the United States of control over Indian trust lands and for exemption from State taxation of property of the native inhabitants of Indian trust lands, will not affect the right of such native inhabitants to vote in regular elections held in the State of Alaska.

Effect of the Alaska Statehood Act on the Suffrage Rights of Indians and Other Native Inhabitants Residing on Indian Trust Lands in Alaska, M-36524 (Aug. 15, 1958)

No payment is required of native occupants of Alaska native villages, either by way of purchase money or fees, upon conveyances to them by trustee of native village lands patented to trustee pursuant to section 3 of the act of May 25, 1926 (48 U. S. C., sec. 355(c)).

Native village lands patented to trustee pursuant to section 3 of the act of May 25, 1926 (48 U. S. C., sec. 355(c)), cannot be disposed of by competitive bidding.

Disposal of Lots in Saxman, Alaska, M-36563 (May 11, 1959) 66 I. D. 212

Occupancy of land within the meaning of the act of May 17, 1906, by a qualified Alaskan Indian gives him a preference right to an allotment which would not be affected by the subsequent inclusion of that land within a shore space reserve.

Indian occupancy of land along navigable waters did not create a shore space reservation because a shore space reserve was created only by an entry of the types specified in the statute, of which Indian occupancy is not one.

Edward W. Harrington, A-27823 (Jun. 15, 1959)

MINERAL LEASES AND PERMITS

A mineral lease or permit may not be issued unless and until a homestead application, settlement claim, or entry for the same land is impressed with a reservation under the act of March 8, 1922 (42 Stat. 415; 48 U. S. C. secs. 376, 377), of the mineral covered by the lease application or permit application.

Act of March 8, 1922 (42 Stat. 415; 48 U. S. C. Secs. 376, 377), M-36483 (Jan. 27, 1958) 65 I. D. 39

ALASKA--Continued

MINERAL LEASES AND PERMITS--Continued

Tide lands in the Territory of Alaska are not subject to oil and gas leasing under the terms of the Mineral Leasing Act.

Layton A. Bennett et al., A-27659 (Nov. 3, 1958)

NAVIGABLE WATERS

Lands consisting of tidelands along the Alaska coast or of beds and bottoms of navigable rivers or lakes in Alaska are not subject to leasing under the Mineral Leasing Act.

Pexco, Inc., et al., A-27868 (Apr. 7, 1959) 66 I. D. 152

Lands consisting of beds and bottoms of navigable rivers in Alaska are not subject to leasing under the Mineral Leasing Act.

Pexco, Inc., A-28010 (Aug. 6, 1959)

NONMINERAL LEASES AND PERMITS

Administration of leases for the cultivation of oysters given under the act of August 2, 1937 (50 Stat. 557; 48 U. S. C., 1952 ed., sec. 223b) authorizing the Secretary of the Interior to lease bottoms in Alaskan waters for the cultivation of oysters is one of the functions retained by the Secretary of the Interior under the provisions of section 6(e) of the Alaska Statehood Act (72 Stat. 339) until January 1, 1960, the first day of the first calendar year following the expiration of 90 calendar days after certification by him that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of the fish and wildlife resources of Alaska.

Administration of Leases of Oyster Bottoms in Alaska Waters, M-36579 (Oct. 5, 1959)

OIL AND GAS LEASES

A noncompetitive oil and gas lease application for unsurveyed land in Alaska is properly rejected where the land description is not given in relation to true cardinal directions and is insufficient to identify the lands applied for.

George Sabolsice, A-27548 (May 23, 1958)

ALASKA--Continued

OIL AND GAS LEASES--Continued

The rental rates applicable to lands added to noncompetitive oil and gas leases, applications, or offers in Alaska upon the exercise of the preference right granted under the act of July 3, 1958 (72 Stat. 322), to have included therein the lands beneath nontidal navigable waters embraced therein are the same as those applicable to the other lands covered by such lease, application, or offer. Upon the addition of such lands to outstanding leases pursuant to the act all the other terms and provisions thereof, including the lease term and anniversary date, are thereafter applicable to the preference-right acreage.

Rental Rates for Preference-Right Oil and Gas Leases or Lease Offers Embracing Lands Beneath Nontidal Navigable Waters in Alaska Under the Provisions of the Act of July 3, 1958 (72 Stat. 322), M-36523 (Aug. 1, 1958) 65 I. D. 313

Where the Bureau of Land Management rejected offers for oil and gas leases in Alaska on the ground that the lands applied for are not subject to leasing under the terms of the Mineral Leasing Act and where the offerors perfected their appeals to the Secretary of the Interior and requested that action on their appeals be deferred until the enactment of pending legislation which might confer preference rights on the offers and where legislation is subsequently enacted which does confer preference rights on those who meet the conditions of the new act, the offers will be remanded to the Bureau of Land Management for adjudication under the new legislation.

Eleanor C. Beritzhoff et al., A-27612, A-27622, A-27636, A-27715 (Aug. 6, 1958)

Lands consisting of tidelands along the Alaska coast or of beds and bottoms of navigable rivers or lakes in Alaska are not subject to leasing under the Mineral Leasing Act.

Upon the admission of Alaska into the Union, the authority granted to the Secretary of the Interior by the act of July 3, 1958, to lease lands beneath nontidal navigable waters terminated.

Section 6 of the act of July 3, 1958, gave a preference right to an oil and gas lease to lands beneath nontidal navigable waters only to those whose leases (or offers or applications) included public lands otherwise available for leasing adjacent to such lands.

Pexco, Inc., et al., A-27868 (Apr. 7, 1959) 66 I. D. 152

ALASKA--Continued

OIL AND GAS LEASES--Continued

Where there is an approved corner of the public land survey within two miles, an offer for a noncompetitive lease of unsurveyed lands in Alaska which is not connected to that corner is defective and earns the offeror no priority.

Stephen P. Dillon, Martha M. Roderick, A-27880 (Apr. 7, 1959) 66 I. D. 148

A noncompetitive oil and gas lease application is properly rejected where the lands applied for are embraced in settlement claims in Alaska which were classified as not prospectively valuable for oil and gas prior to the filing of satisfactory final proof, and no showing is made that the lands involved were known to be mineral in character prior to the filing of final proof.

Fred Axford, A-27933 (Jun. 29, 1959)

A public land survey corner which has never been surveyed, but whose position may be established by protraction, is not a "permanent monument" to which a metes and bounds description in an oil and gas lease application for unsurveyed land in Alaska can be tied.

An oil and gas lease of unsurveyed lands in Alaska is properly canceled where the lease offer was defective at the time it was filed because the metes and bounds description of the lands applied for was not tied to a permanent monument and another lease offer which properly described the land applied for was filed before the lease was issued.

Albert Stevenson, Alexander S. Dunham, A-27953 (Jun. 30, 1959)

Lands consisting of beds and bottoms of navigable rivers in Alaska are not subject to leasing under the Mineral Leasing Act.

Pexco, Inc., A-28010 (Aug. 6, 1959)

Oil and gas lease offers for unsurveyed unnamed islands in Alaska are properly rejected where the description in the offers states only that the islands are located between named unsurveyed islands, named bodies of water, and the shoreline, such a description being too indefinite to identify the islands included in the offer; and oil and gas lease offers for portions of unsurveyed named islands in Alaska are properly rejected where the portion of the island desired is described only by quantity of land and by stating the direction of the land applied for from one outside boundary.

Duncan Miller, A-28035 (Oct. 30, 1959) 66 I. D. 370

ALASKA --Continued

OIL AND GAS LEASES--Continued

Under the regulations in effect in 1957 offers for unsurveyed land in Alaska were required to connect the description of the land applied for to an approved public land survey corner only if the land was within 2 miles of a public land survey corner and where the land was not within 2 miles of an approved public survey corner it had to be connected with such permanent monument as would enable the Bureau of Land Management to identify its location from the Bureau's maps and records.

A monumented triangulation station identified as a "VABM 'Flat' 253" "west of and in the vicinity of Iliamna Lake" is a sufficient description of a permanent monument within the meaning of 43 CFR, 1954 Rev., 71.2(a)2.

Edgar Paul Boyko, Milton H. Lightwood, Jr., A-28049 (Oct. 30, 1959)

Under the amendment of section 22 of the Mineral Leasing Act by the act of July 3, 1958, payment of the first year's rental at the rate of 50 cents per acre is properly required with respect to offers for oil and gas leases on lands in Alaska filed on or after May 3, 1958.

J. W. Bauler, Walter P. Sharpe, A-28069 (Nov. 2, 1959) 66 I. D. 377

SALES

The Department has no authority to refund the purchase price paid for land sold under the Alaska Public Sale Act where the purchaser fails to submit proof of the use of the land and an application for patent within the 3-year period prescribed by the statute.

The Department is not authorized to issue patents under the Alaska Public Sale Act to holders of certificates of purchase who do not submit any proof as to use of the land or applications for patent until more than 5 months after the period required by statute.

The Alaska Public Sale Act and the departmental regulations and certificates of purchase issued under the act require that proof of use of the land for the purpose for which it was classified for sale be submitted within 3 years after issuance of a certificate of purchase, and the Department has no authority to modify the statutory provision that the required proof be submitted within the 3-year period.

Matanuska Valley Lines, Inc., et al., A-27197 (June 23, 1955) 62 I. D. 243

SALES--Continued

The Department has no authority to extend beyond 3 years the period for which certificates of purchase under the Alaska Public Sale Act are issued.

Martha Lee Starns, Administratrix, Estate of Laurence S. Starns, Deceased, A-27185 (June 23, 1955)

Section 2455, Revised Statutes, as amended (43 U. S. C. sec. 1171), was extended to the Territory of Alaska by section 3 of the act of August 24, 1912 (37 Stat. 512; 48 U. S. C. sec. 23), and now applies to that Territory.

Applicability of Public Sale Act to Alaska, M-36303 (Oct. 10, 1955) 62 I. D. 380

In proceedings under Private Law 654 (84th Cong., 2d sess.), purchasers of land under the Alaska Public Sale Act who have paid the full purchase price for the land and who assert that they have performed the requirements for receiving patents on the land will be granted a hearing on the question whether they have complied with those requirements.

In order to be entitled to a patent for land purchased under the Alaska Public Sale Act, a purchaser need show only substantial compliance, not complete compliance, with his land utilization program.

Where no time for beginning or completion of structures is stated in approved plans of proposed use of land purchased under the Alaska Public Sale Act, the determination as to what building program was required is dependent upon what reasonably could have been completed during the 3 years following issuance of the certificates of purchase, considering such factors as physical conditions attending building and the finances of the purchaser.

Matanuska Valley Lines, Inc., et al., A-27545 (May 12, 1958) 65 I. D. 214

SCHOOL LANDS

Subject to the Territory's consent, the Bureau of Land Management may issue permits under the act of July 31, 1947 (43 U.S.C. 1185) to the Alaska Road Commission authorizing it to remove roadbuilding material from school sections reserved for the Territory by the act of March 4, 1915 (48 U.S.C. 353). The con-

ALASKA --Continued

SCHOOL LANDS --Continued

sent may be conditioned upon reasonable payment to the Territory. The Territory has no authority under the act of 1915 to lease the reserved school sections to the Federal Government. Land reserved by the act of 1915 may be withdrawn by public land order for the use of the Department of the Army. Applicability of the act of June 14, 1926 (44 Stat. 741), as amended (43 U.S.C. 869), to school sections reserved by the act of 1915 considered.

School Sections Reserved by the Act of March 4, 1915 (38 Stat. 1214; 48 U.S.C. 353), For the Territory of Alaska, M-36243 (Feb. 8, 1955) 62 I. D. 22

If a school section reserved for the Territory of Alaska by the act of March 4, 1915 (38 Stat. 1214), is later withdrawn or reserved for governmental or other purposes, under the lieu selection provision of the act, the Territory may select land in lieu of that withdrawn or reserved, provided that the withdrawal or reservation was made under authority of the act of June 25, 1910 (36 Stat. 847), as amended (43 U.S.C. sec. 142), or other statutory authority. It is immaterial whether the withdrawal or reservation is permanent or temporary.

The lieu selection provision of the act of March 4, 1915 (38 Stat. 1214), does not authorize the selection of land known to be of mineral character. A reservation of a school section by the act of March 4, 1915, supra, bars mining locations on the section so long as the reservation is in effect. Such a reservation, short of an act of Congress, can be extinguished only by an approved selection in lieu of the land reserved.

The act of March 4, 1915 (38 Stat. 1214), as amended (48 U. S. C. sec. 353), does not authorize the Territory of Alaska to lease to the Department of the Army, or an agency thereof, a school section reserved for the Territory by the act. Absent an act of Congress authorizing the Department of the Army, or an agency thereof, to acquire and hold title to public land, or to lease it, in its own name rather than in the name of the United States, neither is a qualified beneficiary under the act of June 14, 1926 (44 Stat. 741), as amended by the act of June 4, 1954 (43 U.S.C. sec. 869).

School Sections Reserved for the Territory of Alaska by the act of March 4, 1915 (38 Stat. 1214), as Amended (48 U.S.C. sec. 353), and Lieu Selections Made Under that act, M-36229 (Feb. 4, 1957) 64 I. D. 27

ALASKA --Continued

SCHOOL LANDS--Continued

A provision in the act of March 4, 1915 (38 Stat. 1214), as it existed during the years 1925 to 1935 and 1938 to 1941, appropriating and setting apart in the Territorial Treasury, the "entire proceeds or income" derived from mineral school sections not reserved by the act, did not entitle the Territory to royalty on coal mined from such a section during those years by the Alaska Railroad. The Territory was entitled only to the net proceeds from the sale of coal to private parties by the Alaska Railroad if such sales were made during those years.

Claim of Alaska for Royalty on Coal Mined by the Alaska Railroad During Certain Years From a School Section Affected by the Act of March 4, 1915 (38 Stat. 1214; 48 U.S.C. sec. 353), M-36406 (Feb. 4, 1957)

Such portions of the school sections reserved for the Territory of Alaska by section 1 of the act of March 4, 1915 (38 Stat. 1214; 48 U.S.C. sec. 353), as are being used and occupied by a Federal agency and contain Federal improvements when the State is admitted into the Union, are impliedly excepted from the grant made by section 6(k) of the Statehood Act of July 7, 1958 (72 Stat. 339).

Grant of Reserved School Sections in Alaska Made by Section 6(k) of the Statehood Act of July 7, 1958 (72 Stat. 339, 343), M-36528 (Sept. 24, 1958)

SHORE SPACE RESERVES AND RESTRICTIONS

Indian occupancy of land along navigable waters did not create a shore space reservation because a shore space reserve was created only by an entry of the types specified in the statute, of which Indian occupancy is not one.

Occupancy of land within the meaning of the act of May 17, 1906, by a qualified Alaskan Indian gives him a preference right to an allotment which would not be affected by the subsequent inclusion of that land within a shore space reserve.

Edward W. Harrington, A-27823 (Jun. 15, 1959)

TERRITORIAL AGENCIES

A school district is usually a separate taxing district for school purposes.

Organization of School Districts on Indian Reservations in Alaska, M-36367 (Sept. 17, 1956) 63 I. D. 333

ALASKA --Continued

TIDELANDS

Lands consisting of tidelands along the Alaska coast or of beds and bottoms of navigable rivers or lakes in Alaska are not subject to leasing under the Mineral Leasing Act.

Pexco, Inc., et al., A-27868 (Apr. 7, 1959)
66 I. D. 152

In view of the vesting of title in the State of Alaska to tidal and submerged lands within 3 geographical miles of its coastline under the Submerged Lands Act of 1953, extended to Alaska by section 6(m) of the Statehood Act, the Secretary of the Interior now has no authority to withdraw any portion of those lands for a wildlife refuge.

Authority of the Secretary of the Interior to Withdraw, for a Wildlife Refuge, a Portion of the Tidal and Submerged Lands Within Three Geographical Miles of the Coastline of Alaska, M-36562 (Aug. 21, 1959)

TOWNSITES

The Secretary of the Interior will not in his discretion grant a preference right of entry on land in an Alaska Railroad townsite to one owning a structure on the land which was temporary in its inception where the land is needed by the Bureau of Public Roads as a part of its maintenance yard.

Where a garage on skids was placed on land in an Alaska Railroad townsite under oral permission to place only a temporary structure on the land, subject to removal at any time, the garage does not constitute such a permanent improvement as to entitle the owner to a preference right of entry on the land.

Chester E. Peterson, A-27229 (Dec. 22, 1955)

Legal title to lots in a townsite can only be acquired from the townsite trustee. Where a non-native obtained title to certain lots by deed from the townsite trustee who was authorized under section 11 of the act of March 3, 1891 (26 Stat. 1095), to make entries in favor of inhabitants, in the absence of a showing of fraud, no action will be taken to disturb the interests acquired through such deed.

Ownership of Lots 15 and 16, Block 84, in the Townsite of Wrangell, Alaska, M-36355 (June 27, 1956)

ALASKA--Continued

TOWNSITES--Continued

Reference to townsite provisions (sec. 2387 Rev. Stat. and act of March 3, 1891, 26 Stat. 1095) in patent conveying native village lands to trustee pursuant to section 3 of the act of May 25, 1926 (48 U. S. C., sec. 355(c)), is pro forma and not intended to apply purchase money or fee requirements to subsequent conveyances by trustee.

Disposal of Lots in Saxman, Alaska, M-36563 (May 11, 1959) 66 I. D. 212

UNIVERSITY OF ALASKA GRANT

By section 6(i) of the Statehood Act and effective on the date of admission of the State, the scope of the act of 1929 was enlarged so as to include mineral lands and any applications then pending to select mineral lands may be allowed to stand without amendments by the State, but if such an application conflicts with a subsequently filed homestead application pending when the State was admitted, the Territorial application must be rejected subject to the right of appeal.

Grants made by the act of January 21, 1929 (45 Stat. 1091; 48 U. S. C., sec. 354a) to the Territory of Alaska are among those which section 6(k) of the Statehood Act confirmed and transferred to the State of Alaska effective upon its admission into the Union on January 3, 1959.

On January 3, 1959, the State of Alaska succeeded to the Territorial rights under selection applications then pending under the act of 1929, subject to any infirmities or defects the applications then had.

Selections Under the Act of January 21, 1929 (45 Stat. 1091; 48 U. S. C., sec. 354a), M-36567 (Jun. 10, 1959)

APPLICATIONS AND ENTRIES

GENERALLY

Where a statute requires that a document be filed in a certain office by a specified date, the document must be received in that office on or before that date, not merely put in the mails in time to reach the office on time in the normal course of events.

John J. Farrelly et al., A-27068 (Jan. 7, 1955)
62 I. D. 1

APPLICATIONS AND ENTRIES--Continued

GENERALLY--Continued

Where an application for a 5-year extension of an oil and gas lease is addressed to the home address of the manager of the land office and received by him after business hours on Friday, the application will not be considered filed until such time as it is received by the land office on the following Monday, the first business day in which the application can be filed.

Floyd Childress, A-27038 (Mar. 7, 1955)
62 I. D. 73

An application for a grazing lease is not made until it is properly filed.

Robert E. Rowe, A-27063 (April 11, 1955)

Where stock-raising homestead entries were properly canceled after due notice to the entryman, he does not apply for reinstatement until over 12 years later, and he does not establish facts justifying reinstatement of his entries, action on reinstatement will nevertheless be suspended where it appears that the entryman may have placed improvements worth up to $19,000 on the land and there are no adverse interests in the land; and the case will be remanded for a determination of the facts as to the improvements.

Heirs of Albert Peter Mracek, Alford Roos, A-27051 (April 13, 1955)

Where an application for a 5-year extension of an oil and gas lease is deposited in the mail slot of the land office on a Saturday, a non-business day, the application will not be considered filed until such time as it is received by the land office on the following Monday, the first business day in which the application can be filed.

Mattie B. Kinsey, Margaret Kinsey Long, A-27103 (Aug. 22, 1955) 62 I. D. 334

The fact that an application was deposited in the mails in time to reach the proper office before an amended regulation became effective does not excuse the applicant from compliance with the amended regulation.

August A. Frymark, A-27162 (Sept. 12, 1955)

APPLICATIONS AND ENTRIES--Continued

GENERALLY--Continued

One who has made improvements on public land under an assumption of right but who loses his right may, under certain circumstances, be allowed a reasonable time within which to remove any improvements from the premises that can be removed without substantial damage to the land, and a prospective small tract lessee of the land may be required, as a condition precedent to the issuing of the lease, to reimburse the former for the reasonable value of all the permanent improvements which are left on the land and which are of value to the lessee.

William D. Cunningham, Alice F. McGrath, A-27297 (May 28, 1956)

Where an enlarged homestead entry was properly canceled after due notice to the entryman, who does not apply for reinstatement until over 30 years later, and there is no evidence that the entryman has resided upon, cultivated, or improved the land or has in any manner been connected with or interested in it, the entry will not be reinstated, although the entryman is a disabled World War I veteran whose disability is assumed to be the reason he did not return to his entry after discharge.

George W. Dahl, A-27415 (Dec. 10, 1956)

A junior desert land application should be suspended rather than rejected on the ground that an allowable senior desert land application has been filed pending the allowance or other final disposition of the senior application.

Hattie M. Fults, Ernest Maloof, A-27509 (Nov. 19, 1957)

An application for a lease under the Small Tract Act must be rejected where the land applied for is within a power site reserve, and the application will not be held in a suspended status to await the possible lifting of the withdrawal.

John Rovetto, A-27521 (Dec. 9, 1957)

Where an enlarged homestead entry application is rejected on the ground that the lands applied for were reconveyed lands and were not opened to disposition, and during the pendency of an appeal from the rejection of the application the lands are opened to entry, the application must nevertheless be rejected as prematurely filed.

Frank Harrington, A-27654 (Aug. 27, 1958)

APPLICATIONS AND ENTRIES--Continued

GENERALLY--Continued

A homestead application is properly rejected for lands shown by the records to be within a Mexican land grant confirmed in accordance with the act of March 3, 1851, because such lands did not become public lands.

Richard P. Woitke, A-27875 (Apr. 2, 1959)

An application for reinstatement of a desert land entry presented 26 years after proper cancellation and without showing of any equities in the applicants which could justify reinstatement is properly rejected.

Harley G. Ball et al., A-27942 (Jun. 15, 1959)

An application to enter land which is covered by an outstanding prima facie valid entry must be rejected because the entry segregates the land from the public domain and prevents the initiation of any rights by another person until it has been set aside.

Edward W. Harrington, A-27823 (Jun. 15, 1959)

Where successive applications for desert land entry on the same land are filed and an entry is allowed on the first application but is subsequently canceled because the entryman was not entitled to make the entry, it is erroneous to reject the second application for entry on the ground that the second applicant lost his rights under his application upon the allowance of the first application; he loses such rights only if the allowance of the entry on the first application was proper. Ohmer V. Hensel, 45 L. D. 557 (1916), and James R. Gwyn, A-26806 (December 17, 1953), distinguished.

Alfred Donaldson Trotter, Sr., A-27981 (July 21, 1959) 66 I. D. 275

A drawing is properly set aside where it included simultaneously filed offers for oil and gas leases some of which were and some of which were not in conflict in whole or in part.

Henry S. Morgan, Edwin W. Stockmeyer, A-28004 (July 30, 1959) 66 I. D. 278

A request for reinstatement of an offer for an oil and gas lease which the offeror has withdrawn constitutes a new filing which must comply with the requirements of the regulations, including the payment of a filing fee, to earn the offeror priority.

Paul D. Haynes, A-28043 (Sept. 21, 1959) 66 I. D. 332

APPLICATIONS AND ENTRIES--Continued

GENERALLY--Continued

Where an application for the reinstatement of a canceled reclamation homestead entry is denied because the land applied for is no longer within a farm unit and the land is later placed in a farm unit, the application for reinstatement may be allowed, subject to payment of all proper charges.

Martha Kaulitzke, A-27628 (Oct. 29, 1959)

AMENDMENTS

By departmental regulation entries which are void ab initio are not subject to adjustment or amendment under section 2372 of the Revised Statutes, as amended.

Henry S. Morgan et al., A-27556 (June 30, 1958) 65 I. D. 284

An application to amend a desert land entry is properly rejected where the entry sought to be amended has been canceled and closed at the time the amendment application is filed.

Loyd J. Hammons, A-27925 (May 19, 1959)

FILING

Where applicants to purchase land under a small tract lease deposited the application and purchase money in escrow with a bank and directed the bank to file the application within a certain time and the bank delayed the filing beyond the time specified, the applicants must suffer whatever consequences result from the action of their agent.

Albert H. Dobry, George H. Borovay, A-27387 (May 8, 1957) 64 I. D. 116

An application for a 5-year extension of an oil and gas lease which is filed after the close of the published office hours of a land office on the last day of the lease term is not timely filed.

Earl C. Hartley et al., A-27437, A-27446, A-27447 (Jan. 13, 1958) 65 I. D. 12

APPLICATIONS AND ENTRIES--Continued

FILING--Continued

An application to purchase land available for purchase under the Small Tract Act is not filed in the office authorized to receive such applications until it is received in that office.

Robert J. Moore, A-27599 (July 3, 1958)

A document is not filed until it is delivered to the proper officer and received.

John A. Peel et al., A-27701 (Nov. 4, 1958)

The regulation which provides that a document required to be filed within a stated period, the last day of which falls on a nonbusiness day, is timely filed if it is filed on the next business day the office is open to the public, permits additional time for filing an application for extension of a noncompetitive oil and gas lease when the expiration of the primary term of the lease falls on a nonbusiness day, but during that additional time, the land formerly covered by the lease is not segregated solely because an application for extension may be filed; if an application for extension is not timely filed, the land is available for new offers on the first day following the expiration date of the primary term of the lease even though the expiration date fell on a nonbusiness day.

Malcolm C. Petrie, A-28006 (July 31, 1959)
66 I. D. 288

PRIORITY

Where the regulations define "filed simultaneously" with respect to conflicting applications or offers as "filed at the same time," offers filed 1 or 10 seconds apart are not simultaneous filings, but the first offer received is filed prior to the next one.

Oil and Gas Leases--Simultaneous Filings, M-36435 (May 9, 1957) 64 I. D. 124

Where a desert land applicant whose application has been rejected does not object to the rejection but requests the Bureau of Land Management to reinstate his application, and does not object to an announced drawing for the purpose of determining priority between his reinstated application and a conflicting application, his application loses whatever priority it afforded him prior to its reinstatement and he cannot be heard to complain--after the drawing

APPLICATIONS AND ENTRIES--Continued

PRIORITY--Continued

is held and the conflicting application for the same land is given priority--that his application was in good standing and did not need reinstatement and that a drawing was not necessary.

Dianne L. Somsen, Lalovi L. Butler, A-27514 (Jan. 20, 1958)

Lease offers filed immediately after the opening of a land office by offerors who submit their offers in turn without devoting time or attention to other matters are regarded as simultaneously filed even though several minutes may separate the stamping of the first and last offers, but offers filed after the offerors have attended to other business in the land office are given priority on the basis of their actual filing even though the difference in time between the actual reception by the clerk and that of prior filings may be measured in seconds and the offers bear the same time stamp.

Edith M. Kasper, Blanche V. White, A-27821 (Feb. 4, 1959)

An oil and gas lease offer submitted over the counter after the offeror has attended to other business in the land office is given priority on the basis of the actual filing time even though the difference between the actual reception by the clerk and that of an earlier filing may be measured in seconds.

George E. Conley, A-27901 (Apr. 20, 1959)

Lease offers filed immediately after the opening of a land office by offerors who submit their offers in turn without devoting time or attention to other matters are regarded as simultaneously filed even though several minutes may separate the stamping of the first and last offers, but offers filed after the offerors have attended to other business in the land office are given priority on the basis of their actual filing.

George R. Wickham, Raymond J. Hansen, A-27892 (Apr. 21, 1959)

Where a lease offer is received in the land office over the counter prior to the time the land office opens for official business and is not returned to the offeror, it is to be considered as simultaneously filed at the time the land office opens with another lease offer for the same land, even though the latter offer is stamped as received one minute before the first offer, and a drawing must be held to determine the priority of the two offers.

P. A. McKenna, A-27909 (May 18, 1959)

APPLICATIONS AND ENTRIES--Continued

PRIORITY--Continued

A regulation providing that, to determine the order in which simultaneously filed applications will be processed, all such applications which conflict in whole or in part will be included in a drawing does not authorize a drawing of simultaneously filed oil and gas lease offers, some of which are and some of which are not in conflict in whole or in part as to the lands described in the applications.

Henry S. Morgan, Edwin W. Stockmeyer, A-28004 (July 30, 1959) 66 I. D. 278

APPROPRIATIONS

(See also Expenditures, Funds)

In the absence of specific statutory authority, funds cannot be made available to another agency or transferred to another appropriation for objects or purposes for which such funds would not be available under the appropriation from which the transfer is made.

In the absence of specific statutory authority, funds made available by the Interior Department Appropriation Act, 1944 (act of July 12, 1943, 57 Stat. 451, 484), and subsequent appropriation acts, for driving a tunnel to drain mining land at Leadville, Colorado, may not be used to supplement appropriations to construct other facilities.

Expenditure of Unobligated Construction Funds For Other Construction, M-36314 (Oct. 31, 1955)

The statutes have been construed administratively and by the Congress in appropriating funds and authorizing projects as permitting the Interior Department to conduct project investigations for one or more multiple purposes either related or not directly related to irrigation.

Authorization for Bureau of Reclamation to Investigate Pleasant Valley Development, M-36505 (Mar. 28, 1958) 65 I. D. 129

BONNEVILLE POWER ADMINISTRATION

While traditionally claims of contractors based on delays of the Government in furnishing materials, facilities or rights under Government construction contracts have been regarded as claims for unliquidated damages which may not be administratively settled, the Administrator of the Bonneville Power Administration possesses such authority under the Bonneville Project Act, as amended, which gives him power to make and modify contracts and compromise or finally settle any claim arising thereunder. As the Bonneville Administrator possesses such a power, and is subject to the supervisory authority of the Secretary of the Interior, the power may also be exercised by the Board in a proper case in the application of its delegated supervisory authority.

The judicial doctrine that even though the parties to a contract contemplate delay in performance, and under the terms of the contract the Government is expressly exculpated from liability for damages, by reason of the delay, the contract is nevertheless subject to an implied condition that the Government will not cause unreasonable delay was clearly applicable to a contract between the Bonneville Power Administration and a contractor for the construction of a transmission line when the specifications under the contract included a provision that the Government would make "every reasonable effort" to secure rights-of-way for the contractor in advance of its clearing operations.

Appeal of Paul C. Helmick Co., IBCA-39 (July 31, 1956) 63 I. D. 209

Claims of a contractor engaged in the construction of two substations for the Bonneville Power Administration based on charges of misconduct of the inspectors in supervising the work must be rejected when (1) the evidence in support of the claims is extremely stale; (2) the contractor in appealing has not requested a hearing at which the witnesses with knowledge of the events could be heard and subjected to cross-examination; (3) the top officials of Bonneville who were aware of the contractor's charges visited the site of the work for the purpose of investigating the charges, and after investigation found them to be groundless; (4) there is independent evidence of the good character and competence of the inspectors; (5) there were numerous shortcomings in the performance of the contractor's work that might have motivated his countercharges; (6) the charges are based on misunderstandings of the situations from which they arose; and, finally, (7) the charges run counter to inherent probabilities and are otherwise not credible.

The Bonneville Power Administration is not responsible for alleged damages sustained by a contractor engaged in the construction of a substation as a result of its delay in making the

BONNEVILLE POWER ADMINISTRATION--Continued

substation site available to the contractor in the absence of an express promise to make the site available on the date of notice to proceed or the showing of a lack of diligence on its part, particularly when the contractor himself was not fully ready to proceed during the period of delay. Under such circumstances the contractor is entitled only to an extension of time for the delay.

The claim of a contractor engaged in the construction of substations for the Bonneville Power Administration that he was obliged to incur expenses for overtime by reason of an order of the contracting officer to accelerate the work must be rejected when it appears that the contractor was greatly behind in his work at that time; that the contracting officer had the express right under the specifications to direct that the contractor's work force be increased when a satisfactory rate of progress was not being maintained; and that the contracting officer merely authorized the overtime work. Although the contractor had prior thereto requested an extension of time, and the contracting officer had failed to act on the request, the contractor cannot be said to have been prejudiced when the request was not made at the time the delays occurred; the contractor did not demur against the contracting officer's inaction, and the contracting officer, after virtually granting the contractor's request at the time the work was ordered to be accelerated, finally granted an adequate extension of time.

The damage claims of a contractor engaged in the construction of substations for the Bonneville Power Administration based on alleged orders of inspectors to perform work in excess of, or contrary to the requirements of the specifications, must be rejected when the claims are not supported by credible evidence and the contractor did not protest to the inspectors' superiors at the time such work was performed, and request them to determine whether the orders of the inspectors were arbitrary and unreasonable.

A contractor engaged in the construction of a substation for the Bonneville Power Administration cannot successfully assert a claim for damages based on the failure of the contracting officer to approve a source of quarry rock within the period specified in the contract when his request for approval did not clearly designate the source of the rock, and he had no firm commitment for the crushing of the rock during the period of delay.

Appeal of W & W Company, IBCA-54 (Aug. 4, 1958)

BOUNDARIES

(See also, Accretion, Surveys of Public Lands)

In describing a tract of unsurveyed land in a lakebed by metes and bounds in an oil and gas application, it is sufficient to use the meandered lakeshore as a part of the description without giving bearings and distances.

Halvor F. Holbeck, A-27200 (Nov. 14, 1955) 62 I. D. 411

Where the area alleged to have been omitted from a survey consists of a relatively narrow strip of land along the edge of a meandered river and where the meander lines in general follow the river, the land was in a remote area and of little value when surveyed, and it is obvious that the river was intended to be the boundary, the water's edge will be accepted as the boundary and no claim will be made that the allegedly omitted lands are public lands.

Ralph L. Bassett, Edwin J. Keyser, A-27372 (May 20, 1957)

After land has been surveyed and patented by the United States, the boundaries cannot be changed by a resurvey to the prejudice of the patentee.

Nelson D. Jay, A-27468 (Dec. 4, 1957)

In determining the boundaries of an Indian reservation the recognition by the Interior Department of a boundary as such for a period of many years will be deemed controlling.

Availability of Lands for Oil and Gas Leasing--Boundaries of the Fort Peck Indian Reservation, M-36539 (Nov. 19, 1958)

BUREAU OF INDIAN AFFAIRS

The act of August 9, 1955 (69 Stat. 540), applies generally to the leasing of restricted Indian lands wherever situated, including reservations such as the Crow Reservation, where special leasing statutes had theretofore been enacted, thus supplying additional leasing authority without displacing or superseding the special statutes.

Application of the General Leasing Act of August 9, 1955 (69 Stat. 540), to the Crow Indian Reservation, Montana, M-36318 (Dec. 15, 1955) 62 I. D. 469

BUREAU OF LAND MANAGEMENT

It is proper for the Eastern States Office of the Bureau of Land Management, on its own motion, to reconsider its decisions prior to an appeal to the Director, even though there are adverse rights present.

Humble Oil and Refining Company, A-27568 (May 29, 1958) 65 I. D. 257

Where the Director of the Bureau of Land Management has finally disposed of a matter, a subordinate official is without jurisdiction to take any action with respect to it except upon the instruction of the Director.

State of Louisiana, Thomas Connell, A-27817 (Jan. 30, 1959)

BUREAU OF MINES

Under the Helium Act (50 U.S.C. sec. 161), which requires the Bureau of Mines to dispose of helium to Federal agencies in preference over all other applications for purchase of helium, but permits the Bureau to give preference to any Federal agency over another Federal agency, and to the applications of any non-Federal applicant over another non-Federal applicant, the Bureau of Mines may, in effect, operate a partial priorities and allocations system effective as to direct recipients of helium from the Bureau.

Whether Authority Exists for Operating a Priorities and Allocation System for Helium Among Federal Agencies and Private Users, and What Delegations Would be Required to Enable the Bureau of Mines to Exercise Such Authority, M-36299 (Aug. 22, 1955) 62 I. D. 323

The Bureau of Mines is not prohibited from furnishing on a confidential basis to the Small Business Administration for the latter's use in passing upon loan applications, information which may include comments on the value or management of a private mineral property. To avoid the possibility that furnishing the information might violate the owner's rights, a statement should be obtained from him that he does not object to such disclosure.

Authority of Bureau of Mines to Furnish Information to Small Business Administration, M-36309 (Oct. 28, 1955)

BUREAU OF MINES --Continued

In the absence of specific statutory authority, funds cannot be made available to another agency or transferred to another appropriation for objects or purposes for which such funds would not be available under the appropriation from which the transfer is made.

In the absence of specific statutory authority, funds made available by the Interior Department Appropriation Act, 1944 (act of July 12, 1943, 57 Stat. 451, 484), and subsequent appropriation acts, for driving a tunnel to drain mining land at Leadville, Colorado, may not be used to supplement appropriations to construct other facilities.

Expenditure of Unobligated Construction Funds For Other Construction, M-36314 (Oct. 31, 1955)

The Bureau of Mines, pursuant to section 5 of the act of May 16, 1910, as amended (36 Stat. 369; 30 U. S. C. sec. 7), and sec. 212(a) of the Federal Coal Mine Safety Act (66 Stat. 692, 709; 30 U. S. C. sec. 482(a)), has the authority to revise existing regulations or to promulgate new regulations affecting equipment in gassy coal mines whether previously certified as permissible or not, provided, (1) the regulations affect equipment acquired and certified as permissible subsequent to July 16, 1952, and not excluded by the provisions of section 209(f)(1) of the Federal Coal Mine Safety Act; (2) a finding and determination is made by the Bureau based on facts and circumstances not conclusions that the equipment is not experimental but is a demonstrated safety device designed to decrease or eliminate mine fires and explosions caused by the use of such equipment in gassy coal mines; and (3) that the provisions of the Administrative Procedure Act (5 U. S. C. secs. 1001-1011) are followed.

Applicability of Proposed Regulations Requiring Modification of Electric Face Equipment in Gassy Coal Mines, M-36508 (May 7, 1958) 65 I. D. 211

BUREAU OF RECLAMATION

GENERALLY

Transfer of legal function relative to the reclamation program from the Bureau of Reclamation to the Office of the Solicitor did not affect the nature of the function which remains one required in and by reason of the exercise of responsibilities under the Federal reclamation laws.

Transfer of Funds to Office of the Solicitor, M-36233 (May 19, 1955) 62 I. D. 181

BUREAU OF RECLAMATION--Continued

ACCOUNTING

The cost of legal services performed in the field by the Office of the Solicitor that represents services in connection with the reclamation program that were, prior to the transfer of the legal function from the Bureau of Reclamation to the Office of the Solicitor, charged as an item of cost to specific projects continues to be so chargeable and their reimbursability or nonreimbursability is determined by the application of the allocation and accounting procedures applicable to the particular project concerned.

Transfer of Funds to Office of the Solicitor, M-36233 (May 19, 1955) 62 I. D. 181

AUTHORIZATION

The appeal of a contractor from the decision of a contracting officer assessing liquidated damages against the contractor by reason of the late completion of the work cannot be considered on the merits when the contractor failed to give the contracting officer notice of the causes of the delay as required by Article 9 of the standard form of Government construction contract. The consideration of the causes of delay by the contracting officer on the merits does not amount to a waiver of the requirement of notice, since the contracting officer could extend the time for giving notice only with the approval of the head of the Department. Although the head of the Department had delegated to the heads of bureaus the authority to extend the time for giving notice, and had authorized them to redelegate the authority to their subordinates by order published in the Federal Register, no effective redelegation was accomplished in this case, since the Commissioner of Reclamation authorized his contracting officers to extend the time for giving notice by means of an unpublished instruction in the Bureau of Reclamation manual.

Appeal of S. J. Groves & Sons Company, IBCA-8 (April 12, 1955) 62 I. D. 145

The Secretary of the Interior is charged with the responsibility, under section 8 of the Flood Control Act of 1944, for the repayment of allocations to irrigation functions of dam and reservoir projects operated under the direction of the Secretary of the Army.

BUREAU OF RECLAMATION--Continued

AUTHORIZATION--Continued

The foregoing responsibility exists whether or not additional facilities are required for irrigation functions at such dam or reservoir projects.

Responsibility of the Secretary of the Interior Under the Flood Control Act of 1944 for Irrigation Functions at Dam and Reservoir Projects Operated Under the Direction of the Secretary of the Army, M-36475 (Nov. 1, 1957) 65 I. D. 525

/This opinion was not released until Dec. 15, 1958, the date of the Attorney General's opinion regarding it. See 65 I. D., p. 549./

CONSTRUCTION

The Bureau of Reclamation is not precluded by the Keating Amendment provision in its annual appropriation acts from using available funds to initiate construction of electric transmission lines in Iowa as long as the area involved is not covered by an adequate wheeling service contract.

Effect of Keating Amendment on Proposed Iowa Transmission Lines, M-36569 (Jun. 10, 1959) 66 I. D. 226

EXCESS LANDS

The Secretary of the Interior lacks statutory authority to permit individual holders of excess lands in the Kings River Conservation District to pay the reimbursable costs administratively allocable to those holdings and thereby be relieved from the limitations on supplying water to excess lands.

Proposed Contract Between the United States and the Kings River Conservation District, M-36457 (July 10, 1957) 64 I. D. 273

INVESTIGATIONS

Section 2 of the Reclamation Act of June 17, 1902 (32 Stat. 388; 43 U. S. C. sec. 391), section 9 of the Reclamation Project Act of August 4, 1939 (53 Stat. 1187; 43 U. S. C. sec. 485), the Flood Control Act of December 22, 1944 (58 Stat. 887), and intermediate legislation have been considered as authority for the investigation of works having physical and functional purposes either related or not directly related to irrigation.

Authorization for Bureau of Reclamation to Investigate Pleasant Valley Development, M-36505 (Mar. 28, 1958) 65 I. D. 129

BUREAU OF RECLAMATION--Continued

REIMBURSABILITY

The cost of legal services performed in the field by the Office of the Solicitor that represents services in connection with the reclamation program that were, prior to the transfer of the legal function from the Bureau of Reclamation to the Office of the Solicitor, charged as an item of cost to specific projects continues to be so chargeable and their reimbursability or nonreimbursability is determined by the application of the allocation and accounting procedures applicable to the particular project concerned.

The concept of reimbursability is concerned not with appropriated funds per se, but with costs of individual projects, and with respect to such costs, they are reimbursable or not depending upon the purpose to which allocated.

Transfer of Funds to Office of Solicitor, M-36233 (May 19, 1955) 62 I. D. 181

REPAYMENT AND WATER SERVICE CONTRACTS

Repayment and water service contracts entered into by the Secretary of the Interior for the utilization of flood control dams and reservoirs operated under the direction of the Secretary of the Army for irrigation purposes must conform with the mandate found in section 46 of the Omnibus Adjustment Act of 1926.

Proposed Contract Between the United States and the Kings River Conservation District, M-36457 (July 10, 1957) 64 I. D. 273

The foregoing /see first paragraph under "Authorization" above/ responsibility requires negotiation of appropriate repayment contracts with water users for repayment of appropriate allocations to irrigation functions.

Responsibility of the Secretary of the Interior Under the Flood Control Act of 1944 for Irrigation Functions at Dam and Reservoir Projects Operated Under the Direction of the Secretary of the Army, M-36475 (Nov. 1, 1957) 65 I. D. 525

/This opinion was not released until Dec. 15, 1958, the date of the Attorney General's opinion regarding it. See 65 I. D., p. 549/

CLAIMS AGAINST THE UNITED STATES

(See also Contracts, Irrigation Claims, Torts)

GENERALLY

Under section 3 of the act of June 30, 1945 (59 Stat. 265), claims or demands by individual Sioux Indians against the United States for personal property losses are barred unless a claim or demand was filed with the Office of Indian Affairs on or before June 30, 1955.

Since all of the original claimants had been identified prior to the enactment of the act of June 30, 1945, and were in the position of having had claims filed for them, and since the overwhelming majority of the original claimants were deceased at the time of the enactment, the statutory bar, as a practical matter operates against heirs and devisees who had not been identified so as to put them in the position of filing a claim or making a demand on or before June 30, 1955.

Statutory Time Limit on Payment of Claims Under Act of June 30, 1945 (59 Stat. 265), M-36333 (Mar. 6, 1956)

Where a mining claim is invalidated and rendered null and void for failure to comply with the provisions of section 4 of the act of August 11, 1955 (69 Stat. 681; 30 U. S. C. sec. 623), the subsequent action on behalf of the United States in exercising active control over the land within the former mining claim could not adversely affect any rights of the former mining claimant, and no title or possessory interest remains in the former mining claimant which could serve as a proper basis for a claim against the United States for damages to improvements.

Effect of the Act of August 11, 1955 (69 Stat. 681; 30 U. S. C. Sec. 623), M-36501 (Jan. 23, 1958) (Memorandum from Regional Solicitor, Sacramento, California, to Regional Director, Bureau of Reclamation, Sacramento, California, January 23, 1958.)

CLAIMS BY THE UNITED STATES

Accrued rental under a grazing lease becomes a debt due to the United States which the Secretary of the Interior has no authority to waive or compromise.

E. R. Wheeler, A-27069 (April 1, 1955)

CLAIMS BY THE UNITED STATES--Continued

14 Comp. Dec. 310 permits payment for repairs to Government-owned property to be made directly to establishment making repairs by party causing damage.

3617 Revised Statutes (31 U.S.C. sec. 484) requires that all monies received from whatsoever sources for the use of the United States be deposited in the Treasury as miscellaneous receipts, unless otherwise provided by law.

Payment for Repair of Damage to Government Property, M-36383 (Apr. 26, 1956)

After lands were conveyed to the United States, if the lessee continued paying rents to the original lessor or the lessee failed to pay rents which were past due and payable, then subject to any applicable statute of limitations the United States might have a cause of action against both the original lessor for the moneys received and the lessee for past due rents owed.

Leasability as to Noncompetitive Oil and Gas Leasing Under the Mineral Leasing Act for Acquired Lands of August 7, 1947, of Certain Lands Conveyed to the United States Under the Provisions of Title III of the Bankhead-Jones Farm Tenant Act Subject to Outstanding Oil and Gas Leases, M-36430 (Mar. 29, 1957)

Where the /fishing/ vessel was purchased solely to protect the interest of the United States by virtue of its lien and is not required for the needs of this Department or the discharge of its responsibilities, its disposal under the provisions of the act is authorized.

Where a fishing vessel is sold to satisfy a first lien held by the United States arising out of a fisheries loan authorized by the Fish and Wildlife Act of 1956 (70 Stat. 1119; 15 U. S. C. sec. 742a), the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale as the Secretary of the Interior or his authorized representative may direct. 62 Stat. 972; 28 U. S. C. sec. 2410.

Sale of Vessel Acquired as Incident to Foreclosure of Fisheries Loan, M-36565 (Jul. 27, 1959)

COAL LANDS

The legislative history of section 20 of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), makes it clear that the act revoked the withdrawals of coal land made under authority of section 2 of the act of October 20, 1914 (38 Stat. 742; 48 U.S.C., sec. 433).

Proposed Public Land Order Opening Coal Reserves in Alaska, M-36572 (Aug. 20, 1959)

COAL LEASES AND PERMITS

GENERALLY

A petition to amend a coal leasing unit to eliminate certain lands which the applicant desires to have offered as a separate unit will be rejected where the record shows that the leasing unit established will allow reasonable access to the unit from the private lands of competing applicants and where division of the unit into two smaller units would diminish the value of the land and necessitate impractical and uneconomic mining practices.

E. S. O. Coal Company, A-27386 (Nov. 7, 1956)

The formal acceptance of a relinquishment of a coal lease relates back to the date of filing of the relinquishment thus terminating the lease term as of that date and preventing the subsequent accrual of rental under the lease. This is true even though the relinquishment is of a lease containing no provision making it subject to future regulations and which was issued prior to the approval of a departmental regulation providing that a relinquishment of a coal lease, upon its acceptance, shall take effect as of the date of its filing.

Relinquishment of a Coal Lease, M-36511 (June 17, 1958)

Where notice of a coal lease auction was given in accordance with the regulations and seems to have afforded all those interested, except one, time to prepare for the bidding, an allegation that the notice was too short is properly disregarded.

Lucille Mines, Inc., A-27558 (June 6, 1958)

COAL LEASES AND PERMITS --Continued

APPLICATIONS

A coal lease will not be issued where the showing required by regulation has not been made by the applicant as to the need for additional coal production which cannot otherwise be reasonably met.

Albert J. Turk, W. E. Baker, A-26990 (Jan. 21, 1955)

LEASES

The leasing of coal lands under the Mineral Leasing Act is not limited to situations where such detailed information is available concerning the coal deposits that a determination can be made with some degree of assurance as to whether a mining operation would be an economic success.

Sinclair Mines, Inc., A-27160 (Aug. 18, 1955)

It is proper to refuse to set aside a coal lease auction on the basis of allegations that one bidder improperly barred another from use of a road when the allegations of impropriety are based upon (1) an asserted lack of authority in the Secretary of Agriculture (or his delegate) to authorize exclusive use of a road in a national forest and (2) a violation of a criminal law, because a protest against a coal lease auction is not the proper forum for such charges.

Where coal land has been classified as suitable for disposition by leasing, rather than permit, the classification will not be changed on the basis of unsupported allegations by a protestant that the classification is incorrect.

Where the notice of a coal lease auction covering over 5,120 acres offered in units states that an award of each unit may be made to the s same successful bidder, the notice must be read as being subject to the acreage limitation provisions of the Mineral Leasing Act.

Lucille Mines, Inc., A-27558 (June 6, 1958)

PERMITS

Land which contains a known coal seam and on which two coal mines have previously been operated and likewise land which is adjacent to lands on which five coal mines have been operated and which contains a known coal seam the minable thickness of which has been determined by drill holes and prospect openings are subject

COAL LEASES AND PERMITS --Continued

PERMITS--Continued

to the leasing provisions of the Mineral Leasing Act, as amended, and applications for coal prospecting permits on such lands are properly rejected.

Sinclair Mines, Inc., A-27160 (Aug. 18, 1955)

An application for a 2-year extension of a coal prospecting permit will be rejected where the permittee has not exercised reasonable diligence in prospecting for coal on the lands embraced in the permit and shows no other reason warranting the granting of an extension.

Arthur E. Moreton, A-27172 (Dec. 28, 1955)

An application for a coal prospecting permit on lands which adjoin land upon which a mine has been developed in a workable seam of coal and which (the lands applied for) are known to contain this seam is properly rejected.

Morris Kline, A-27651 (Oct. 29, 1958)

RENTALS

Where an assignee has assumed the obligation of his assignor for rentals and royalties accrued prior to the assignment and has also agreed to liquidate this debt by payments on each ton of coal mined, the inability of the lessee to produce coal from the lease does not relieve him of his liability.

A cash bond filed by an assignee of a coal lease at the time the assignment was approved cannot be returned to him while past due rentals are due on the lease.

Weyland U. Ewing, A-27286 (May 7, 1956)

The Department of the Interior has no authority to accept a compromise of a debt in the form of rents and royalties owed to the United States which have accrued under a coal lease issued under the Mineral Leasing Act.

Michael L. Moauro, A-27576 (May 29, 1958)

COAL LEASES AND PERMITS--Continued

RENTALS--Continued

The formal acceptance of a relinquishment of a coal lease relates back to the date of filing of the relinquishment thus terminating the lease term as of that date and preventing the subsequent accrual of rental under the lease. This is true even though the relinquishment is of a lease containing no provision making it subject to future regulations and which was issued prior to the approval of a departmental regulation providing that a relinquishment of a coal lease, upon its acceptance, shall take effect as of the date of its filing.

Relinquishment of a Coal Lease, M-36511 (June 17, 1958)

ROYALTIES

The Department of the Interior has no authority to accept a compromise of a debt in the form of rents and royalties owed to the United States which have accrued under a coal lease issued under the Mineral Leasing Act.

Michael L. Moauro, A-27576 (May 29, 1958)

COLOR OR CLAIM OF TITLE

GENERALLY

A person who has a contract with another under which he is authorized to subdivide and sell land assertedly owned by the latter and which does not purport to vest any title to the land in the former cannot be said to hold the land under claim or color of title.

Arthur Baker et al., Skrmetti Realty Co., A-27416, A-27417 (Apr. 1, 1957) 64 I. D. 87

A color of title application filed pursuant to the act of February 23, 1932, is properly rejected where the land applied for is not public land.

Nelson D. Jay, A-27468 (Dec. 4, 1957)

COLOR OR CLAIM OF TITLE --Continued

GENERALLY--Continued

An application for the purchase of land under the Color of Title Act must be rejected where the claim or color of title was initiated after January 1, 1901, on land which was then withdrawn and where no valuable improvements have been placed on the land and no part of the land has been cultivated.

Lewis J. H. Bockholt, Jeanette B. Fischer, A-27906 (May 4, 1959)

A mineral reservation is not required in a patent granted under the Color of Title Act if the claimant so requests and has satisfactorily established that the requirements of the act have been complied with by him and his predecessors for the period beginning not later than January 1, 1901, to the date of the application and if the land is not within a mineral withdrawal or subject to an outstanding mineral lease at the time of issuance of the patent.

Where, after a tract of land was determined to be subject to patent as a class 2 claim under the Color of Title Act, a mineral lease was issued thereon, but the lease is relinquished before a patent is granted to the color of title applicant, the land may be patented without a reservation of oil and gas, all else being regular.

Lela Oates Ormond, A-27977 (Aug. 5, 1959)

A protest against the public sale of a tract of land, based on the protestant's claim of title to the land derived from a Spanish grant, is properly rejected where the patent issued in confirmation of the grant does not include the particular tract; however, the protestant may be given an opportunity to apply for the tract under the Color of Title Act.

Lamar Louise Curry, A-28023 (Aug. 10, 1959)

A color of title application cannot be approved for land which was reserved and set apart as a public reservation of forest lands before the initiation of the claim described in the application.

Packwood Lumber Company, A-28080 (Nov. 16, 1959)

APPLICATIONS

Any period of time during which an occupant or claimant of public land knows or should know that title to the land is in the United States must be disregarded in determining whether the

APPLICATIONS--Continued

land has been held for 20 years in good faith adverse possession under claim or color of title within the meaning of the Color of Title Act, and an application to purchase land under this act must be rejected where the land applied for has not been held under claim or color of title for 20 years.

Edward T. Harris, Sr., A-27785 (Jan. 19, 1959)

A class 2 application to acquire a patent to public land under the Color of Title Act is properly rejected where the application shows on its face that the title under which the claim is filed did not commence until after January 1, 1901, and that the state and local taxes on the land were not paid continuously up to the date of the application.

Maude C. Hare, A-27825 (Feb. 2, 1959)
66 I. D. 33

An application under the Color of Title Act for a class 2 claim is properly rejected where the claimant has not shown that he or his predecessors in interest have held the land applied for commencing not later than January 1, 1901.

S. J. Mazza, Jr., A-27957 (Aug. 3, 1959)

APPRAISED VALUE

The value of the mineral resources in the so-called Class II type of color of title applications made pursuant to the act of July 28, 1953 (67 Stat. 227, 228, 43 U.S.C. sec. 1068(b) (Supp. III, 1956)), must be appraised and the value will be reflected in the purchase price paid for the land. Appraisals of mineral resources under the act of July 28, 1953, supra, are determined by the provisions of section 2 of the act of December 22, 1928 (45 Stat. 1070, 43 U.S.C. sec. 1068(a) (1952)).

Appraisals of Mineral Values and Mineral Reservations Under the Act of December 22, 1928 (45 Stat. 1069), as Amended by the Act of July 28, 1953 (67 Stat. 227, 228, 43 U.S.C. secs. 1068 et seq., M-36385 (Nov. 26, 1956)

CULTIVATION

An application for the purchase of land under the Color of Title Act must be rejected where the claim or color of title was initiated after January 1, 1901, on land which was then withdrawn and where no valuable improvements have been placed on the land and no part of the land has been cultivated.

Lewis J. H. Bockholt, Jeanette B. Fischer, A-27906 (May 4, 1959)

GOOD FAITH

One cannot be said to be holding land in good faith under claim or color of title after he asks the Bureau of Land Management how he can secure a patent to the land.

An application to purchase public land under the Color of Title Act is properly rejected where the applicant shows as his claim of title only the settlement or occupation of the land by his grantors and himself for more than 20 years, but fails to show that such occupation was founded on any reasonable basis for believing that the land was held in good faith under a valid claim.

Marion M. Pontius, A-27473 (Nov. 7, 1957)

Any period of time during which an occupant or claimant of public lands knows or should know that title to the land is in the United States must be disregarded in determining whether the land has been held for 20 years in good faith adverse possession under claim or color of title within the meaning of the Color of Title Act, and an application to purchase land under this act must be rejected where the land applied for has not been held under claim or color of title for 20 years.

Edward T. Harris, Sr., A-27785 (Jan. 19, 1959)

IMPROVEMENTS

It is questionable whether such work as clearing brush and cutting trails on land, which has only a short-lived effect, constitutes the placing of "valuable improvements" on land within the meaning of the Color of Title Act.

COLOR OR CLAIM OF TITLE--Continued

IMPROVEMENTS--Continued

An application for patent under the Color of Title Act will be denied where the applicant fails to show to the satisfaction of the Secretary of the Interior that valuable improvements have been placed on the land applied for as required by the act.

Homer Wheeler Mannix et al., A-26964 (Supp.) (Aug. 13, 1956) 63 I. D. 249

The fact that land held under color or claim of title may have been improved is not sufficient to meet the requirement of the Color of Title Act that valuable improvements shall have been placed on the land where it is shown that the improvements were destroyed prior to the time the applicant acquired his claim of title and where it is shown that the improvements were not on the land when the application to purchase was filed.

Improvements placed on land held under color or claim of title after the discovery by the claimant that his title to the land is defective do not satisfy the requirement of the Color of Title Act that the land shall have been improved.

The mere surveying and platting of land is not the placing of improvements thereon within the meaning of the Color of Title Act.

Arthur Baker et al., Skrmetti Realty Co., A-27416, A-27417 (Apr. 1, 1957) 64 I. D. 87

Where a claimant otherwise meets the requirements of the Color of Title Act the fact that he did not place an improvement on the land is immaterial so long as the improvement was made prior to the date of his application and is in existence at the time thereof.

Kurt J. Reif, United States Forest Service, A-27625 (Mar. 10, 1958)

An application for the purchase of land under the Color of Title Act must be rejected where the claim or color of title was initiated after January 1, 1901, on land which was then withdrawn and where no valuable improvements have been placed on the land and no part of the land has been cultivated.

Lewis J. H. Bockholt, Jeanette B. Fischer, A-27906 (May 4, 1959)

CONFIDENTIAL INFORMATION

The statements filed semi-annually pursuant to the act of August 2, 1954 (68 Stat. 648, 30 U.S.C. sec. 184 (Supp. III, 1956)), amending section 27 of the Mineral Leasing Act of 1920, by optionees of oil and gas leases or applications are not confidential information but are open for inspection by the general public as a matter of policy because no legal objection barring their inspection by persons other than parties thereto is evidenced by the act or prior policy of the Department. Orderly inspection procedure of the statements filed semi-annually pursuant to the act of August 2, 1954 (68 Stat. 648, 30 U.S.C. sec. 184 (Supp. III, 1956)), can be maintained under current regulations.

Whether or not the Statements Filed Semi-Annually Pursuant to the Act of August 2, 1954 (68 Stat. 648, 30 U.S.C. sec. 184) (Supp. III, 1956), by Optionees of Oil and Gas Leases or Applications may be Inspected, M-36386 (Nov. 13, 1956)

CONSTITUTIONAL LAW

It is not a deprivation of "due process" for an officer other than the one who hears the evidence in a mining contest to decide the case.

United States v. Alonzo A. Adams et al., A-27364 (June 3, 1957) 64 I. D. 221

It is the prerogative of the Senate of the United States to designate Senators-elect of newly-admitted States to serve for 2 years, 4 years, or 6 years, in their initial term of office. It is the practice of the Senate upon the seating of Senators from a newly-admitted State to assign each of the two Senators-elect to a separate class in regard to tenure of office by the drawing of lots.

Classification of the First Senators From the State of Alaska in Regard to their Initial Term of Office, M-36522 (July 30, 1958)

The furnishing of textbooks purchased with appropriated funds to students attending sectarian schools is not public support of religion within the prohibition of the First and Fourteenth Amendments to the Constitution of the United States.

Validity of Act of the Legislature of Guam Furnishing Textbooks Free of Charge to Students in Public and Private Elementary and Secondary Schools in Guam, M-36533 (Oct. 3, 1958)

CONTESTS AND PROTESTS
(See also Rules of Practice)

Under the regulations of the Department a contest can be initiated against a homestead entry on grounds other than abandonment although the entryman has gone into military service.

If a homestead entryman goes into military service after a contest is initiated against his entry, the contest will not be dismissed but the proceedings will be suspended during his period of military service.

David H. Evans et al., A-27353 (Oct. 31, 1956)
63 I. D. 352

A person whose only relationship to a tract of public land is that he may be a prospective lessee has no right to bring a contest proceeding to dispute the determination made by the Secretary (or his delegate) to lease the land at auction and his objections to the auction are properly treated as a protest.

Lucille Mines, Inc., A-27558 (June 6, 1958)

One who does not bid at a lease offering can, as a protestant, call to the Department's attention any irregularities in the handling of the offering.

Calazona Fertilizer Company, A-27710
(Jan. 19, 1959) 66 I. D. 4

A protest against a school indemnity selection can be raised for the first time on an appeal to the Secretary prior to final approval and certification of the selection.

Augusta G. Stanley v. State of California,
A-27928 (Jun. 15, 1959)

A protest which alleges that mining claims have been located upon land which has been surveyed at the request of a settler, does not, without further proceedings, amount to a pending protest or contest within the meaning of the proviso to section 7 of the act of March 3, 1891.

Audrey I. Cutting, George Peter Smith,
A-28031 (Oct. 8, 1959) 66 I. D. 348

CONTRACTS
(See also, Labor, Delegation of Authority, Rules of Practice)

GENERALLY

Minor mistake of Western Union in telegram accepting bidder's offer is not fatal where intent to accept offer is otherwise clear.

Plymouth Oil Company, IA-453 (July 15, 1955)
62 I. D. 262

In case of a dispute as to allowances due the contractor under a change order, where the contracting officer requests the contractor to either accept the change order or take an appeal from his decision, which he has declared to be final, such conduct does not amount to duress. The contractor had been merely asked to choose between two perfectly legal alternatives.

Appeal of Sam Bergesen, IBCA-11 (Aug. 1, 1955)
62 I. D. 295

Where under the terms of a Materials Act contract for the sale of timber an application for extension of time for severance and removal of timber must be filed not less than 90 days before the expiration of the contract, an application for extension filed 20 days after the expiration date of the contract is properly rejected.

Clyde Williams, A-27388 (Oct. 31, 1956)

A contractor who was entirely cooperative, and who would have provided additional works to protect its operations in rehabilitating an existing irrigation system, if such works had been clearly demanded or even suggested by project personnel, cannot be held to have been negligent in the conduct of its operations when a storm occurred that proved to be of such magnitude that its consequences could hardly be said to have been foreseeable either by the contractor or by project personnel. The burden of proving that the contractor was negligent rests on the Government in such circumstances, and this burden cannot be sustained simply by showing failure on the part of the contractor to coordinate effectively the work of its subcontractors, so that they would perform the subcontracts on time, if the prime contractor did not breach its obligation of timely performance towards the Government, nor by showing that the prime contractor performed other acts in the course of construction which may not have been causative factors in magnifying the damage caused by the storm. However, the contractor was guilty of negligence when, having completed a wasteway structure, he failed to place the

CONTRACTS--Continued

GENERALLY--Continued

backfill above the structure for a period of approximately 6 months prior to the storm, since such neglect would expose the structure to damage even in an ordinary rainy season.

Appeal of Barnard-Curtiss Company, IBCA-82 (Aug. 9, 1957) 64 I. D. 312

Where an error has been made in estimates under specifications containing an approximate quantities provision, the Board cannot afford relief by reforming the contract on the ground of mutual mistake.

Appeal of the Diamond Engineering Company, IBCA-93 (Dec. 20, 1957)

Invitations for bids, bids and contractual documents are public records to the extent that they do not involve "trade secret" and "know how" data. Public records are available for inspection in accordance with the procedure set forth in 43 CFR 2.1. Restrictions on the public's right to know how the Department's public business is conducted should be held to a minimum.

Protest of Thomas Works, Delta-Star Electric Division, H. K. Porter Company--Invitation No. 8527--Bonneville Power Administration, M-36487 (Dec. 24, 1957) 64 I. D. 463

A decision declaring a high bid at a phosphate lease sale and stating that a lease will be offered to the high bidder but not until the lands are surveyed does not constitute an acceptance of the bid.

Where a phosphate lease sale is held with a minimum expenditure requirement as a condition of the sale and a bid is offered on that basis and the manager purports to accept the bid free from the minimum expenditure requirement, the purported acceptance is not an acceptance but a counter offer which does not result in a contract.

Calazona Fertilizer Company, A-27710 (Jan. 19, 1959) 66 I. D. 4

In view of the need for uniformity in matters involving the construction and application of Government contracts, such matters are under the exclusive control of Federal law as fashioned by Congress and the Federal courts.

Appeal of Bushman Construction Company, IBCA-193 (Apr. 23, 1959) 66 I. D. 156

CONTRACTS--Continued

ACTS OF GOVERNMENT

A contractor engaged in rehabilitating an existing irrigation system should expect that some maintenance work and even minor construction work will be performed during the construction period of the contract, and the fact that such work was performed does not excuse the contractor from repairing damage caused by flood waters resulting from an unusually heavy rainstorm. This is especially so when the contractor has failed to show that there was a causal connection between such work and the damage to the contractor's work.

Appeal of Barnard-Curtiss Company, IBCA-82 (Aug. 9, 1957) 64 I. D. 312

Delay by the Congress in enacting annual appropriation legislation is not a foreseeable cause of delay, and a lapse of time between the date of approval of an annual appropriation act and the date when a bureau makes an allocation of funds for work on a construction project may constitute a basis for an extension of time.

Appeal of Minnis & Shilling, CA-225 (Supp.) (Aug. 30, 1957)

A claim of a clearing contractor for additional compensation because of a shortage of marketable materials, which it had a right to dispose of under the terms of the contract, may be allowed under the "changes" article of the standard form of Government construction contract when the shortage was due to conduct of the Government that reduced the quantum of the clearing work to be done by the contractor. The contractor, however, would not be entitled to additional compensation if such missing materials were not within the scope of the clearing work to be done under the contract, or were removed without the sanction of the Government after the passing of title to the contractor.

Appeal of Ideker Construction Company, IBCA-124 (Oct. 3, 1957) 64 I. D. 388

Delays in the completion of a building caused by the issuance of Government purchase orders that necessitate deferment of completion of the building until the articles specified in the orders can be procured and installed are excusable.

The issuance by authorized Government personnel of instructions or requests that progress of the contract work be held up while consideration is being given to the advisability of making changes in the specifications constitutes an excusable cause of delay.

CONTRACTS--Continued

ACTS OF GOVERNMENT--Continued

The presence in a contract of specifications that necessitate reference to the catalogs of various dealers in order to identify the types, styles and sizes of required articles constitutes an excusable cause of delay if the specifications are ambiguous, by reason of such circumstances as the use by a named dealer of the same number to designate different articles in different catalogs, but not if the specifications are unambiguous.

Appeal of Chas. I. Cunningham Co., IBCA-60 (Dec. 6, 1957) 64 I. D. 449

A provision imposing liquidated damages for delay in shipment, contained in a contract for the delivery of pumping equipment to be used for irrigation purposes, is not rendered unenforceable as a penalty merely because the Government after the making of the contract defers the construction of the pumping station in which the equipment is to be installed, or merely because the Government informs the contractor of this deferment prior to the shipment date specified in the contract, or merely because favorable rainfall conditions avert the crop losses contemplated when the contract was made, so that no harm results from the delay in shipment.

Appeal of Fairbanks, Morse & Co., IBCA-146 (Aug. 11, 1958) 65 I. D. 321

A contractor is not entitled to an extension of time for performance on the ground that the Government required the installation of a different type of pump than that designated in the specifications when there is no showing that either type of pump, the delivery of which would have required from 60 to 90 days, would have arrived on the job at the time of its contemplated installation.

Appeal of Black Hills Ditching Co., Inc., IBCA-145 (Aug. 15, 1958) 65 I. D. 342

A claim of a contractor for additional compensation that is based solely upon alleged unreasonable or otherwise improper conduct of the Government in furnishing materials to be installed by a contractor, which results in increasing the cost of performance of a contract, is a claim for unliquidated damages for breach of contract that is not within the authority of administrative officers of the Government to consider or allow.

Appeal of Earl W. Hagerman, d/b/a Hagerman Construction, IBCA-183 (Jan. 21, 1959)

CONTRACTS--Continued

ACTS OF GOVERNMENT--Continued

When the Government was required to inspect and accept the work of a contractor which was required to prepare and furnish aerial photographs and topographic maps, and the contractor contended that the inspection was unreasonably delayed by the Government, it had to establish not only that such delay was unreasonable in the circumstances of the case—which cannot be established merely by allegations in a brief—but also that, but for the duration of the Government's delay, it would have required less time to make the corrections. The recognition by the Government of its own responsibility for part of the delays by not imposing liquidated damages for periods required for inspection and transmission of material does not prevent the apportionment of the remainder of the delays to the contractor. The contract, by providing expressly for excusable causes of delay, including "acts of the Government," inferentially provided for the apportionment of delays.

Appeal of Air Survey Corporation, IBCA-152 (Jun. 30, 1959) 66 I. D. 246

A contractor, who undertook to fabricate and supply turbines for a power plant, and who seeks to excuse its delays in the performance of the contract on the grounds that its subcontractors were delayed by the occurrence of a steel strike and by work having national priority is not entitled to an extension of time for performance when it has failed to prove either of its contentions by substantial evidence. It is necessary for the contractor to show not only that the steel strike occurred but also that it was a factor responsible for delay.

Appeal of The James Leffel and Company, IBCA-205 (Oct. 8, 1959)

ADDITIONAL COMPENSATION

Where a contractor is permitted by the contracting officer upon his request to vary the sequence of placing concrete, the contractor is not entitled to additional compensation for increased labor costs in cleaning and roughening construction joints, since the contractor was clearly at fault in failing to protect the joint surfaces adequately, and the terms of the specifications expressly excluded the payment of additional compensation "by reason of any limitation in the placing of concrete."

Where a contract contains a labor escalator clause, providing for adjustment of changes in costs of labor after a certain period, the contractor is not entitled to the benefit of the clause

ADDITIONAL COMPENSATION--Continued

when he has extended the hours of the working week beyond those permitted by the contracting officer in accordance with the terms of the contract.

Appeal of Lowdermilk Brothers, IBCA-10 (Feb. 11, 1955)

Where, in the construction of a sewer, the original plans were discovered by the Project Engineer, who was the active supervisor of the work, to be erroneous, and he was allowed to revise the plans without any corrective action on the part of the contracting officer who was remote from the job, and as Chief Administrative Officer of the Bureau of Indian Affairs had other numerous and important duties to perform, and the Project Engineer thereafter made an error in laying out the sewer, the contractor is entitled to additional compensation for relaying part of the sewer in order to correct the error, and a proper change order should be entered.

Appeal of Art Pugsley, D/B/A Art Pugsley Construction Co., IBCA-5 (Feb. 25, 1955) 62 I. D. 54

A contract for aerial photography and topographic mapping of a reservoir and project lands provided for the mapping of all lands within a designated boundary up to a limiting contour, and for aerial photography only of the lands within the designated boundary north of a certain parallel of latitude. The parties, nevertheless, treated the designated boundary as only approximate, and the contractor was paid for mapping a considerable number of areas outside the designated boundary but within the limiting contour. In these circumstances, the contractor is entitled to additional compensation for aerial photography necessary to map an area on the northern edge of the project where the limiting contour ran considerably beyond the designated boundary. The fact that the additional work was not supported by a written change order, does not bar the allowance of the claim since the disputed area was mapped with the knowledge and consent of representatives of the contracting officer, payment was made for the maps which were retained by the Government, and the mapping could not be required without also consenting to the photography.

Appeal of Ryall Engineering Company, IBCA-1 (Mar. 30, 1955) 62 I. D. 118

ADDITIONAL COMPENSATION--Continued

A contractor who was required to lengthen and reconstruct a bridge in accordance with unit prices stipulated in a schedule for erecting salvaged timber in structures, removing timber in existing structures, and salvaging timber, was not entitled to additional compensation for removing the center span of the existing bridge prior to the construction of the center pile bent for the lengthened bridge, and replacing the center span in its original position, when the removal of the center span was a necessary operation in reconstructing the bridge, and no provision for payment for this work was contemplated by the contract.

Where a contract provided for the excavation of a particular section of a channel in accordance with specifications and drawings, and the requirements of the work were reasonably ascertainable from the drawings relating to that section of the canal and a related drawing, which showed that there was much more material on one side of the centerline of the channel than on the other side, and that the embankments were designed to be approximately equal and to contain a water flow of 4,000 c.f.s., which would require the embankments to be a minimum height of 18 feet above the bottom grade of the channel if allowance was also to be made for a freeboard, the contractor is not entitled to additional compensation for equalizing the embankments to the necessary minimum height, notwithstanding the omission of the 18-foot dimension on one of the drawings, and its revision by the contracting officer to show the omitted dimension, at a time when the contractor had virtually completed the excavation work on that section of the canal.

Appeal of A. G. McKinnon, d/b/a McKinnon Construction Co., IBCA-4 (April 25, 1955) 62 I. D. 164

Revisions of the drawings for the construction of the earthwork and concrete foundations of an office building which do not involve changes or extras do not entitle the contractor to additional compensation by way of an equitable adjustment within the meaning of Article 3 of the standard form of Government construction contract.

Appeal of M. Hoard, IBCA-6 (May 11, 1955)

The claim of a contractor for additional compensation for laying a pipe across a stream under somewhat changed conditions must be denied to the extent that the amount claimed exceeds that offered by the Government when the contractor's testimony is vague and incon-

ADDITIONAL COMPENSATION--Continued

sistent with the documentary evidence in the case, and the contractor arrived at the amount of his claim simply by subtracting his original estimate of the cost of crossing the stream from what he claimed were his actual costs.

Appeal of S. M. Johnson, d/b/a Johnson Construction and Maintenance Company, IBCA-13 (Aug. 18, 1955)

A claim for additional compensation for supplying an increased quantity of gravel backfill under the concrete floor slab of a building, based on an alleged incorrectness of the elevations shown on a sheet of the plans, must be denied when this sheet did not govern the excavation and fill requirements except to the extent that the compacted fill must be up to or above the column footing elevations set forth, and the plans as a whole indicated what was required of the contractor. The bidder is under a duty to examine all of the drawings, and a misunderstanding growing out of failure to do so cannot prejudice the Government. Effect must be given to all the provisions of the specifications and drawings.

Appeal of Johnson Construction and Maintenance Company, IBCA-15 (Oct. 28, 1955)

A contractor is not entitled to additional compensation for providing ventilating outlets in the concrete floor of the auditorium of a high school as part of the ventilating system even though the auditorium floor seating, which was an alternate in the bidding, was temporarily eliminated, and the specifications may not have provided all the details for the outlets, since openings were required by the specifications to be constructed as part of the ventilating system, which had not been eliminated, and the specifications also permitted the contracting officer to supply such detailed drawings as might be necessary.

Where the specifications for the construction of a high school required that the building be constructed entirely of various types of steel and aluminum panels manufactured by the Detroit Steel Products Company, except for the foundations and structural steel, and that the manufacturer or his authorized representative erect the panels, the contractor is not entitled to additional compensation for work undertaken to correct leaks which appeared in the building after the installation of the wall and roof panels when the evidence shows that the panels were erected by a subcontractor not authorized by the

CONTRACTS--Continued

ADDITIONAL COMPENSATION--Continued

Detroit Steel Products Company, and the instructions of the manufacturer for the erection of the panels were not followed in a considerable number of respects. The contractor has the burden of proving that the panels could not produce a weather-tight building, even if the instructions of the manufacturer had been followed in their entirety.

Where the plans and specifications for the construction of footings for a high school gave the results of subsurface investigations and indicated the depth of the footings, which were to be keyed in solid rock, to be 1 foot 6 inches, but also contained language that indicated uncertainty in the plans, and that the rock lines shown on the plans were "approximate", the depth of the footings cannot be regarded as definite and precise. The contractor is, nevertheless, entitled to additional compensation for constructing footings which exceeded the indicated depth by more than one foot, as held by the original contracting officer.

A contractor is not entitled to additional compensation for work voluntarily undertaken.

Appeals of Carson Construction Company, IBCA-21, IBCA-25, IBCA-28, IBCA-34 (Nov. 22, 1955) 62 I. D. 422

When in the performance of a contract for the completion of earthwork and structures to be paid for at unit prices, the units of work were estimated, and the specifications included a provision stating that the estimated quantities were approximations for comparing bids, and no claim should be made against the Government for excess or deficiency therein, claims of the contractor for additional compensation based on large overruns in the estimated quantities, which concededly did not result from changes in the work within the meaning of the "changes" article in the standard form of Government construction contract, are claims for breach of an implied condition of reasonability in the performance of the contract, and, as such, are claims for unliquidated damages which the Board lacks jurisdiction to consider or allow. Even though the Government erroneously estimated one of the units of work, the contract may not be reformed on the ground of mutual mistake of fact, since there was no agreement to perform so much work for a lump sum but only an agreement to perform an approximate quantity of work at so much a unit of work.

Appeal of R. P. Shea Company, IBCA-37 (Nov. 30, 1955) 62 I. D. 456

CONTRACTS--Continued

ADDITIONAL COMPENSATION--Continued

The making of an equitable adjustment to provide additional compensation for extra work resulting from the issuance of a stop order does not necessarily entitle the contractor to payment upon the basis of unit prices in the contract, although in some situations the unit prices in a contract may constitute a fair measure of the equitable adjustment to be made for the extra work ordered. The making of an equitable adjustment requires merely the ascertainment of the cost of the extra work and the addition to the cost of a reasonable and customary allowance for profit. Unit prices could not be applied in the present case, moreover, to determine the amount of the equitable adjustment, since the extra work was either part of a unit of the contract for which payment of a lump sum was provided, or part of work to be done at a unit price that included other work, as well as the supply of various materials.

Appeal of Guthrie Electrical Construction,
IBCA-22 (Supp.) (Mar. 30, 1956)

A contractor who has encountered a quantity of rock in re-excavating a portion of a recently excavated canal is not entitled to additional compensation under article 4, the "changed conditions" article of the standard form of Government construction contract (No. 23) when the specifications and drawings provided for unclassified excavation and indicated the presence of rock, and the contractor had information or sources of information from which it could readily have ascertained the condition which was encountered. Conditions cannot be said to be "unknown" within the meaning of article 4 when they are foreseeable or ascertainable with the exercise of ordinary prudence, nor can conditions be said to be unusual within the meaning of the same article unless they turn out to be substantially worse than might reasonably be anticipated under the circumstances of the case.

Appeal of L. D. Shilling Company, Inc.,
IBCA-23 (Supp.) (Apr. 30, 1956) 63 I. D. 105

Where in the construction of a canal, the contractor chose to construct a single "railroad" type of embankment of sufficient width to encompass both banks, and then excavated the canal prism from this embankment, the contractor is not entitled to additional compensation for re-excavating or re-handling the embankment material under specifications which left the sequence of operations entirely to the contractor, and provided that the applicable unit prices were to cover all work done. The fact that there may have been no other practicable method of constructing the canal than the one adopted does not entitle the contractor to additional compensation.

CONTRACTS--Continued

ADDITIONAL COMPENSATION--Continued

Claims for additional compensation arising out of the construction of the Fort Clark Unit of the Missouri River Basin Project must be rejected, when the claims are either based on alleged extra work which was required by the specifications, or the claims are for unliquidated damages not cognizable by the Board, or the contractor failed to protest against the alleged extra work as required by the specifications.

Appeal of Korshoj Construction Co., Inc.,
IBCA-9 (May 2, 1956) 63 I. D. 129

A claim for additional compensation for repairing leaks in pipes under a contract which involved the construction of pipelines may be allowed notwithstanding the execution by the contractor of a release of claims arising out of such repairs when the contractor erroneously understated the number of the leaks repaired and the Government in accepting the release had knowledge of circumstances which should have put it on notice that the amount of the claim reserved in the release was so low as to indicate that the contractor was making a mistake and that its acceptance would, therefore, be inequitable.

Appeal of United Concrete Pipe Corporation,
IBCA-42 (May 31, 1956) 63 I. D. 153

Under article 10 of the standard form of Government construction contract which provides that the contractor "shall be responsible for all materials delivered and work performed until completion and final acceptance," and that upon completion of the contract, "the work shall be delivered complete and undamaged," the burden of repairing any damage to work prior to the acceptance thereof is put upon the contractor, notwithstanding the absence of fault on his part. Consequently, a contractor is not entitled to additional compensation when he has been required by the contracting officer to remove from a lateral material blown there by the wind before the work had been accepted.

A contractor is not entitled to additional compensation, under the unit of a schedule for structure excavation, for quantities excavated from previously placed embankments, above the original ground line, around constant head orifice and pipe turnouts, when the specifications contain no provisions which prescribe the nature or the sequence of the contractor's operations; when standard practice in the construction of laterals does not require that the building of the structures be deferred until after all embankment work has been completed; and when the specifications state or import that payment is

to be made only for excavation that is required. The fact that in some of the paragraphs of the applicable specification, which dealt with types of structures not involved in the present claim, it was specifically stated that excavation for structures would be measured for payment "below the original ground surface" does not in itself establish an ambiguity in the applicable paragraphs, which were otherwise clear but omitted this phrase. There are many ways of expressing the same thought, and differences in the use of language do not necessarily betoken differences in meaning and intention.

Appeal of Osberg Construction Company, IBCA-32 (June 19, 1956) 63 I. D. 180

The Board must reject the contractor's claim that it is entitled to additional compensation for cutting the merchantable timber on the special tracts themselves. The contractor performed this work without making any effort to obtain an extra work order in writing as required by the contract and specifications. The performance of the work without obtaining an extra work order made it voluntary, and it has long been settled that a contractor is not entitled to additional compensation for voluntary work. The fact that partial payments were made during the progress of the work is also without significance, since such payments were only provisional; nor did the performance of the work with knowledge of the Government inspectors improve the contractor's position. A contractor may have reasons of his own for undertaking work not required by the specifications, and the inspectors would not interfere with him unless the work affected the interests of the Government. If the presence of inspectors could validate work undertaken without a written extra work order, the requirement that such an order be obtained would be rendered nugatory, since Government inspectors are always present at the sites of the work. Furthermore, the contractor has failed to show convincingly that the so-called merchantable timber cut from the special tracts was in fact merchantable. Since the definition of merchantability in the specifications was rather vague, the parties solved this problem practically by arranging to have the merchantable trees marked with yellow paint. The evidence does not warrant the conclusion, however, that the trees were so marked.

When in the course of clearing the right-of-way a forest fire occurred, the contractor was required under the applicable specifications to make every reasonable effort to suppress the fire, and hence is not entitled to additional compensation to cover its costs of suppressing

the fire. It is immaterial that the fire may not have been caused by its operations, and that orders to suppress the fire were issued to the contractor by the contracting officer upon request of the United States Forest Service. If the fire was caused by the contractor's operations, it was liable, moreover, to pay to the Forest Service its costs of suppressing the fire, and damages for injury to National forest lands, and the contracting officer was justified in withholding from payments due to the contractor an amount sufficient to cover this contingent liability. Although the contracting officer has found that the fire was caused by the contractor's operations, and is liable to the Forest Service for its costs and damages, his finding is a mere conclusion wholly unsupported by the evidentiary facts, and he is directed to revise his finding to remedy this defect.

Appeal of Paul C. Helmick Co., IBCA-39 (July 31, 1956) 63 I. D. 209

A contractor that encountered shale in working on sections of the Franklin Canal, a part of the Missouri River Basin Project, is not entitled to an equitable adjustment under the "changed conditions" article of its contract when the specifications called for unclassified excavation; the records of the subsurface investigations were not guaranteed; there were shale exposures in the vicinity; shale had been encountered under other contracts in the same vicinity; the generally known geological conditions in the neighborhood indicated the presence of shale; and the quantity of shale excavated amounted to only approximately 6 percent of the total structure excavation, and to less than two-tenths of 1 percent of the total excavation. The contractor could not insist that it would handle only such an amount or kind of shale as could be excavated with normal excavating equipment. As the specifications did not prescribe the type of equipment it was to employ, it was required to have such equipment as could take care of such hard material as might actually be encountered. It also could not rely on an alleged custom in the construction industry, requiring the payment of ten times the dirt price when a hard material was encountered, since such a custom even if adequately established could not override the express provisions of the specifications.

A contractor who prior to the acceptance of its bid agreed to be bound by an expected redetermination of minimum wage rates by the Department of Labor is not entitled to additional compensation by reason of paying such wage rates, which were generally higher than the previous ones, when under the regulations of the Department of Labor governing wage determinations, such determinations did not become obsolete until more than 90 days had elapsed since the award of the contract to which the rates

CONTRACTS--Continued

ADDITIONAL COMPENSATION--Continued

applied, and the contract was awarded within this period. Under the circumstances of the present case, the contract was awarded when the contracting officer finally notified the contractor that he had been awarded the contract rather than when the contract and bond forms were forwarded to the contractor for preliminary examination and execution.

A contractor is not entitled to additional compensation by reason of an overrun in compacted embankment work over the estimated amount of such work indicated in the schedule, notwithstanding that this estimate was erroneous when the specifications included an approximate quantities provision; when the amount of compaction work actually required of the contractor conformed to the dimensions and standards prescribed by the drawings and specifications; and when the contractor could have roughly computed this amount from the drawings before submitting its bid. A memorandum issued by one of the Government engineers to the contractor at its request in which the compacted and uncompacted embankment work remaining to be done was computed in tabular form in general conformity with the requirements of the specifications and drawings did not constitute a change within the meaning of the "changes" article of the contract, and hence did not entitle the contractor to additional compensation.

Appeal of J. D. Armstrong Company, Inc., IBCA-40 (Aug. 17, 1956) 63 I. D. 289

A contractor who has constructed compacted embankments to a greater width than called for by the specifications in order to serve his own convenience is not entitled to compensation for the excavation of the additional material so used when the specifications provided for payment only for "required" excavation, and the narrower embankments required by the specifications could have been constructed with standard excavating and rolling equipment either by constructing a railroad type of embankment or by patrol blading. It is immaterial under the circumstances of the case that the wider embankment could be used by the Government as a roadway for maintenance purposes.

A contractor is not entitled to additional compensation for placing in canal embankments material excavated from the canal, even though some of the material had to be rehandled (since the embankments could not be built until a lining had been placed in the canal), when under the terms of the specifications suitable material removed in excavation was to be used in the construction of embankments, and the unit price for canal excavation was to cover the cost of all work in connection with the construction of canal embankments.

CONTRACTS--Continued

ADDITIONAL COMPENSATION--Continued

A contractor is not entitled to additional compensation for cleaning windblown material from constructed laterals when under the terms of the contract the contractor was required to deliver all work "complete and undamaged," and the contractor has not shown that the Government exceeded its normal rights as a landowner, or was otherwise at fault, in clearing adjoining farm units from which some of the windblown material may have derived. Moreover, even if the fault of the Government were to be presupposed, the restorative work would constitute neither a "change" nor an "extra," and could not, therefore, form a basis for the allowance of additional compensation under the contract.

Appeal of McWaters and Bartlett, IBCA-56 (Oct. 31, 1956)

A claim for additional compensation based on variations from estimated quantities, which were not the result of any changes in the contract's requirements but were due to faulty estimates originally made by the Government and which, although considerable, were not so great that bad faith on the part of the Government in preparing the specifications could be implied, does not furnish a basis for an equitable adjustment. Although one item in the schedule was entirely deleted, it was only one of a considerable group of closely related items, and it was so trivial in amount compared to the total amount involved in the contract that it would not in itself seem to call for an equitable adjustment. Moreover, in so far as this item or any other item in the contractor's claim may be based on the contention of bad faith on the part of the Government or such unreasonableness of the Government's estimates as would amount to a breach of contract, it would constitute a claim for unliquidated damages which could not be allowed administratively.

Appeal of A. S. Horner Construction Co., IBCA-75 (Dec. 20, 1956) 63 I. D. 401

A claim for additional compensation on account of an increase in wages granted by the contractor, in response to a union demand, must be denied where the only contractual provision under which the claim might conceivably be allowed is limited to expenses that are "actual, reasonable, and necessary," and where there is no showing that the labor market in the contract area was such that the contractor had no alternative but to meet the demand.

Appeal of Commonwealth Electric Company, IBCA-87 (Jan. 18, 1957)

ADDITIONAL COMPENSATION--Continued

A contractor's claim for additional compensation, based on the delay of the Government in making timely delivery of steel members to be incorporated in towers to be erected by the contractor under specifications which did not prescribe the contractor's sequence or mode of operations, nor fix definite dates for the delivery of the steel members, is a claim for unliquidated damages that may not be administratively settled.

A contractor's claim for additional compensation for placing gravel under tower footings to stabilize the foundations must be disallowed when the record shows that the contractor adopted this method for its own convenience to solve a dewatering problem which was its responsibility under the terms of the applicable specifications.

Appeal of Parker-Schram Company, IBCA-71 (Jan. 31, 1957)

The Board of Contract Appeals lacks jurisdiction to consider a claim for additional compensation when no appeal was taken from the contracting officer's decision rejecting the claim within the time specified in the "disputes" clause of the contract.

Appeal of Tri-State Construction Co., IBCA-63 (Feb. 26, 1957) 64 I. D. 38

Where the specifications contain an approximate quantities provision, a contractor is not entitled to additional compensation by reason of underruns in estimated quantities of crushed-rock blanket and riprap merely because the Government changed the design prior to the advertisement for bids but neglected to correct the estimates, if in fact the schedule quantities could have been verified by the contractor from the information supplied by the drawings and specifications. The mere fact that there was some degree of uncertainty in estimating the quantities from the drawings and specifications is immaterial if the degree of uncertainty was not appreciable.

Appeal of Texas Construction Company and Hyde Construction Company, IBCA-73 (Apr. 23, 1957) 64 I. D. 97

Under a contract for the construction of Section "G" of the Richardson Highway in Alaska, the contractor is not entitled to additional compensation under the "changes" and "changed conditions" articles of the contract, notwithstanding the fact that the locations and yields of the borrow pits indicated on the plans did not reflect the yields of the borrow pits used in construction. Not only did the Government not guarantee the data indicated in the plans and reserve the right to establish substitute borrow pits when pits indicated on the drawings failed but the Government also under the terms of the special provisions of the contract modifying the "changes" and "changed conditions" articles reserved the right to make changes in the plans to meet unanticipated field conditions, and limited the right of the contractor to additional compensation to instances in which there were overruns or underruns in excess of 25 percent of estimated quantities. The contractor was, therefore, entitled to additional compensation only to the extent that borrow and overhaul exceeded the stated limitation.

CONTRACTS--Continued

ADDITIONAL COMPENSATION--Continued

The total deletion by the Government of an item providing for a select borrow surface course in a contract for the construction of Section "G" of the Richardson Highway in Alaska entitles the contractor to an equitable adjustment under the "changes" article of the contract when the item was deleted because of insufficiency of funds rather than to meet unanticipated field conditions, provided that the contractor has demonstrated a relation of cause and effect between the deletion of the item and the consequences attributed thereto. The contractor is entitled to an equitable adjustment for preparatory work on a specialized plant designed to produce the select borrow material economically but not for another plant which was either not acquired for the sole purpose of performing the deleted item or which was abandoned as the instrument for the performance of the item long before its deletion. On the other hand, the contractor is not entitled to any equitable adjustment by reason of difficulties encountered in finishing the subgrade when such difficulties were due to its own haste and inadequacies in finishing the subgrade prior to the deletion of the surfacing course, or by reason of the prolongation of the work into another operating season when this was due to the same cause, and to the failure of the contractor to give timely notice of completion prior to the onset of winter weather. A highway contractor may not maintain high-salaried employees and equipment during the winter to complete work that had been virtually completed at the close of the prior working season for fear that the Government might require excessive repairs of winter maintenance when such fear proved groundless. In any event, a claim that the failure of the Government to perform its obligations under a contract resulted in the prolongation of the work into another season is a claim for unliquidated damages that may not be administratively settled or allowed.

Appeals of Morrison-Knudsen Company, Inc., IBCA-36 and IBCA-50 (May 27, 1957) 64 I. D. 185

CONTRACTS--Continued

ADDITIONAL COMPENSATION--Continued

A contractor who, in excavating a trench for a sewer in Charlotte Amalie, St. Thomas, Virgin Islands, in an area along the shoreline where a seawall and other waterfront improvements had been installed, encountered an unusually large number of submerged pier piles that were extremely difficult to remove, in addition to piles at a site indicated on a sheet of the drawings as the "Site of Old Pier Piles," is entitled to additional compensation either under the "changed conditions" or "changes" clause of the contract for the work involved in removing such piles. A general site investigation clause included in the specifications was too vague to constitute a sufficient warning of the existence of submerged piling at sites not indicated on the drawings, and the contractor may be said to have encountered a "changed condition" either because the existence of the submerged piling was a subsurface physical condition that differed materially from the representation made in the drawing, or because the number and character of the piles constituted an unknown physical condition of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. To the extent that the submerged piling actually removed was in excess of that indicated on the plans, there was also a "change" in the scope of the work.

A contractor who, in excavating the trench for a sewer in Charlotte Amalie, St. Thomas, Virgin Islands, in an area of hydraulic fill installed in connection with the construction of a seawall, encountered in a large part of the area extremely unstable soil conditions that materially increased the costs of the excavation and made necessary a departure to a large extent from the methods of laying the sewer pipe prescribed in the specifications, is entitled to additional compensation under the "changed conditions" clause of the contract. The statement in the Invitation for Bids that the trench for the sewer was to be in "dredged fill" denoted, especially in connection with the surface appearance of the area, a classified fill rather than a spoil bank area. If the fill was a classified fill, the contractor had no reason to expect the difficulties it actually encountered. While the specifications did suggest the possibility of minor difficulties, they did not suggest the highly abnormal conditions actually encountered by the contractor. Since the sewer line could not be successfully laid by following entirely the methods prescribed in the specifications, and the Government acquiesced in the methods actually employed, the contractor is also entitled to additional compensation under the "changes" clause of the contract.

Appeal of Caribbean Construction Corporation, IBCA-90 (June 28, 1957) 64 I. D. 254

CONTRACTS--Continued

ADDITIONAL COMPENSATION--Continued

A contractor who was performing a contract to rehabilitate an existing irrigation system was obligated under the terms of the contract, which indicated that the work was to be delivered complete and undamaged, to repair the damage to such work caused by flood waters resulting from an unusually heavy rainstorm, even though it may not have been at fault in constructing the protective works required by the specifications. The costs of the repair work cannot be allowed under the "changed conditions" article of the contract.

In order to permit inspection of damage caused by a flood resulting from an unusually heavy rainstorm a contractor could be required to dewater a headworks structure inundated by the flood waters when the contract provided that the contractor was to provide without cost to the Government reasonable facilities for the inspection of the work.

The question whether a contractor who was engaged in the rehabilitation of an existing irrigation system may be required to repair storm damage to the work outside the pay or neat lines of the contract depends in large part upon whether the contractor was negligent in its operations prior to the occurrence of the storm. Although under the terms of the contract the contractor was required to repair the storm damage irrespective of fault on its part, this obligation would be limited to the restoration of the work it had undertaken under the contract. On the other hand, if the contractor were guilty of negligence in the conduct of its operations prior to the storm, it would be obligated to repair any damage attributable to its negligence, whether within or without the pay or neat lines. However, even though the contractor were not negligent, the scope of its obligation to repair storm damage would not be so narrow that it could not be required to do any work that was outside the pay or neat lines, nor so wide that it could be required to restore any property of the Government that may have been damaged by the storm. Thus, the contractor, who was required to make an opening through an embankment, was not obligated to rebuild other portions of it, irrespective of the relationship of this work to the restoration of the area excavated by the contractor or to the completion of other features of the contract work.

Appeal of Barnard-Curtiss Company, IBCA-82 (Aug. 9, 1957) 64 I. D. 312

The equitable adjustment to which a contractor is entitled upon termination of a Government construction contract includes not only an allowance for profit but also for general overhead on the uncompleted portion of the work.

Appeal of D. R. Haddox, IBCA-84 (Supp.) (Oct. 18, 1957)

CONTRACTS--Continued

ADDITIONAL COMPENSATION--Continued

A claim for additional compensation made by a tunneling contractor on the ground that it encountered "changed conditions" within the meaning of the first category of conditions specified in the U. S. standard form of Government construction contract, namely conditions materially different from those indicated by the drawings or specifications, cannot be allowed where the specifications provided that the geological conditions were not guaranteed, and that no additional allowance would be made for tunnel excavation on account of the nature or condition of any of the material encountered, and the drawings, although they contained in summary form logs of exploration, or drill hole information, were in themselves only representations of what was found in the particular drill holes rather than representations of what the contractor would encounter in actual excavation.

A claim for additional compensation made by a tunneling contractor on the ground that it encountered "changed conditions" within the meaning of the second category of conditions specified in the U. S. standard form of Government construction contract, namely conditions of such an unusual nature that they could not reasonably have been anticipated by the contractor, may be allowed notwithstanding the inclusion of caveatory, or exculpatory provisions in the specifications. Nevertheless, the burden of proving a claim in the second category is a fairly heavy one, since the contractor must show not only that it encountered conditions that were unexpected to it but also that the conditions encountered would have been generally regarded as unexpected by others engaged in the same type of operations. Therefore, such a claim must be rejected when the record shows that the contractor made only a hurried and casual prebid investigation; the specifications required the tunnels constructed to be fully supported; the drill hole information indicated the possibility of encountering adverse geological conditions; and the percentage of overbreak experienced by the contractor was only slightly more than should have been expected in view of the geological conditions, and the slight excess may have been attributable to the contractor's methods of operation.

Appeal of J. A. Terteling & Sons, Inc., IBCA-27 (Dec. 31, 1957) 64 I. D. 466

The existence of an error in calculating an estimated quantity of excavation and of a further unexplained discrepancy between the estimated quantity of excavation and the actual excavation does not in itself establish that a contracting officer was wrong in finding and concluding that the contractor could have made a sufficiently accurate calculation of the probable amount of

CONTRACTS--Continued

ADDITIONAL COMPENSATION--Continued

the excavation by utilizing information supplied by the drawings and specifications, and that, in view of the approximate quantities provision included in the specifications, additional compensation could not be allowed by reason of a substantial underrun below the estimated quantity.

Appeal of the Diamond Engineering Company, IBCA-93 (Dec. 20, 1957)

When the Government ordered a supply of copper tubing which was to be used in the fabrication of heat exchangers, and the straightness of the tubes was of "paramount" importance but the specifications, although they included straightness among the characteristics of workmanship, failed to specify a tolerance for straightness, the supplier was entitled to additional compensation for straightening the tubing after delivery in order to meet the Government's requirement for straightness, which allowed a tolerance of only one hundredth of an inch per foot.

Appeal of Atlantic Aluminum & Metal Distributors, Inc., IBCA-129 (Apr. 22, 1958) 65 I. D. 173

When a contracting officer erroneously construes the terms of a contract, with the result that the contractor is asked to supply cable and conduit not required by the contract, the contractor is entitled to additional compensation for such materials.

Appeal of Westinghouse Electric Corporation, IBCA-134 (Supp.) (Apr. 30, 1958) 65 I. D. 203

A contractor was engaged in stringing operations while constructing a transmission line under a contract which required the reels of conductor to be furnished by the Government. After stringing operations had commenced, the contractor discovered that many of the reels were defectively wound, and that this condition necessitated stops in its operations for the purpose of disentangling individual wraps of the conductor and of cutting off tails. The contractor filed a claim for additional compensation for performing this work, and a change order, which provided additional compensation and which was accepted by the contractor, was entered. Subsequently, the contractor filed an additional claim based on a general slow-down of its operations, as distinguished from the complete stoppages of its operations involved in the repair or adjustment of the defectively reeled conductor. The

slow-down claim also included an element based on "over-inspection" of the contractor's operations. The slow-down claim must be rejected when the evidence shows that the contractor operated too fast rather than too slow, and that this method of operation rather than the condition of the conductor or over-inspection was responsible for the difficulties.

Appeals of Tyee Construction Company and Parker-Schram Company, IBCA-112 and IBCA-113 (Apr. 30, 1958)

After the occurrence of a storm, which damaged an excavation for anchors and footing for spillway 30-ton cableway, the contracting officer allowed the contractor an option in performing the necessary repair work between placing concrete to the limits of the excavation or forming to the neat line of the structure, in addition to requiring him to clean out the excavation. The contractor conceded his obligation to remove the materials that had sloughed into the excavation but contended that it could not be required to re-excavate beyond the neat lines or to place concrete fill in this area. Although the specifications required excavation to be made only to the neat lines of the structures, and it was contemplated that forming would be necessary only above ground levels, the repair of storm damage is not generally regarded as extra work, even though it is not contemplated by the specifications, and hence the contractor was not entitled to additional compensation unless it could show that the contracting officer, in allowing it a choice only between two alternatives prevented it from adopting still another method which was reasonably adapted to the requirements of the situation and which would have been less expensive than either of the two methods which were allowed. It is immaterial that the cost of repairing the storm damage was disproportionate, or that the work to be performed under the contract was limited to foundation work.

Appeal of Younger Bros., Inc., IBCA-148 (May 28, 1958) 65 I. D. 238

The claim of a contractor engaged in the construction of substations for the Bonneville Power Administration that he was obliged to incur expenses for overtime by reason of an order of the contracting officer to accelerate the work must be rejected when it appears that the contractor was greatly behind in his work at that time; that the contracting officer had the express right under the specifications to direct that the contractor's work force be increased when a satisfactory rate of progress was not being maintained; and that the contracting officer merely authorized the overtime work. Although

the contractor had prior thereto requested an extension of time, and the contracting officer had failed to act on the request, the contractor cannot be said to have been prejudiced when the request was not made at the time the delays occurred; the contractor did not demur against the contracting officer's inaction, and the contracting officer, after virtually granting the contractor's request at the time the work was ordered to be accelerated, finally granted an adequate extension of time.

Appeal of W & W Company, IBCA-54 (Aug. 4, 1958)

Despite the fact that a dike, which was constructed across a marsh by the contractor, was not constructed entirely in accordance with the method contemplated by the specifications, the contractor is not entitled to an equitable adjustment under the "changes" clause of the standard form of Government construction contracts, when the change in the method of construction was suggested by the contractor rather than by the contracting officer, and the contractor made the suggestion without requesting a change order, such work being voluntary work rather than a change in the technical sense. Moreover, if the method of construction adopted actually mitigated the difficulties of the contractor, arising from the continuous subsidence of the core of the dike in the marsh, any equitable adjustment would have to be made downwards rather than upwards. The contractor also could not claim that the sequence of operations contemplated by the specifications--placing fill, grading fill and placing topping material--was infeasible when it did not itself follow such sequence, and the officers of the Government did not attempt to interfere with the sequence of operations actually adopted by the contractor.

Appeal of Reid Contracting Company, Inc., IBCA-74 (Dec. 19, 1958) 65 I. D. 500

A claim for additional compensation made by a tunneling contractor, who expected that the tunnel would be drilled entirely through andesite rock but who found that, except for short distances near the portals, the tunnel had to be drilled through volcanic tuff breccia, may not be allowed under the "changed conditions" - clause of the standard form of Government construction contract when the evidence shows that the tunnel was drilled through a volcanic mountain area of rapidly changing formations, the geologic data set out in the contract drawings was insufficient to reflect the subsurface geology of the central reaches of the tunnel, the Government in the specifications explicitly and emphatically disclaimed knowledge of subsurface conditions in those reaches, and the surface

CONTRACTS--Continued

ADDITIONAL COMPENSATION--Continued

geology was likewise insufficient to justify a conclusion that the tunnel would be driven through andesite rock for its entire length, and provision was also made in the specifications for contingencies that indicated that difficulties might be encountered in the excavation. In view of all these circumstances, the fact that the tunnel had to be more fully supported than the Government expected is not significant, especially since it appears that the amount of supports represented a compromise between the Government's engineers and the State safety inspectors in order to prevent the work from being shut down. Since the tuff breccia encountered by the contractor was not absolutely continuous; there were variations in the structure and other qualities of the material; and the record fails to show that the amount of tuff breccia exceeded the amount that could reasonably have been anticipated, there must also be rejected the contractor's contention that it could not reasonably have expected to encounter a continuous stretch of almost 3,000 feet of tuff or tuff breccia in variable volcanic material in a tunnel which was approximately 3,600 feet long.

A claim for additional compensation made by a tunneling contractor, who encountered volcanic tuff breccia rather than andesite rock which it expected, must be rejected, even if it be assumed that the tuff breccia material constituted a "changed condition" within the meaning of that clause in the standard form of Government construction contract, when the contractor is unable to prove that such material actually increased the difficulties of excavation and its costs. Such a conclusion must be reached when the record shows that normally tuff breccia is as easy to work in as andesite rock, and that the contractor's difficulties may have been largely due to its lack of experienced employees with the requisite know-how for dealing with the problems encountered and its employment of experimental methods and equipment which may have impeded the work.

Appeal of George A. Lord and William T. Lord, Partners, d/b/a Lord Bros. Contractors, IBCA-125 (Feb. 16, 1959) 66 I. D. 34

A claim of a contractor for additional compensation on account of monetary losses allegedly resulting from a failure of the Government to make monthly progress payments as provided by the contract is based on a breach of contract, and may not be administratively determined under a standard-form construction contract.

Appeal of J. W. Merz, IBCA-64 (Mar. 10, 1959)

A motion for reconsideration of a claim of a roadway contractor based on the allegation that the Government by deleting a select borrow surface course, which the contractor had planned to use to correct deficiencies in the subgrade, and by failing to supply suitable topping material for finishing the subgrade both prior and subsequent to the deletion, had increased the contractor's costs in finishing the subgrade must

CONTRACTS--Continued

ADDITIONAL COMPENSATION--Continued

be denied when it appears that (1) the contractor has not borne the burden of proving that it made every reasonable effort to conserve suitable topping material from excavation and borrow, as required by the specifications, and that the Government failed to designate borrow pits from which suitable topping material could be obtained; (2) the initial grading by the contractor had been very rough; (3) the gravamen of the contractor's complaint was really that too much of the borrow material had to be windrowed rather than that it was unsuitable; (4) the contractor's alleged plan to make good the deficiencies of the subgrade with select borrow was an afterthought and the alleged plan would in any event have been inconsistent with the requirements of the specifications relative to the laying down of the subgrade, and might have involved greater expense than the use of ordinary borrow; and, finally, (5) the contractor failed to give timely notice of and protest against the alleged denial of suitable topping material.

Appeal of Morrison-Knudsen Company, Inc., IBCA-36 and IBCA-50 (Mar. 23, 1959) 66 I. D. 71

Bridge construction contractors who in pouring concrete for the decks of two bridges constructed by them were required to do so in a particular sequence or manner, which necessitated the installation of construction joints not contemplated by the specifications, were directed to perform extra works, and hence are entitled to additional compensation and extensions of time for the performance of the work.

Bridge construction contractors, who were instructed to cut and recess a few metal stirrups used to hold the reinforcing steel in place while the concrete for the bridges was being poured, were not directed to perform extra work, since the work was so inconsequential that it did not materially affect the whole operation of getting the concrete true, even and free from projections, as required by the specifications.

When it is apparent from the whole record that in taking their appeal the contractors are not only requesting extensions of time but also additional compensation for extra work, and that the contracting officer intended to deny such additional compensation, the Board will direct the contracting officer to determine the amount of such additional compensation, notwithstanding the defects of the formal claims of the contractors.

Appeal of Cox and Haddox, IBCA-155 (Mar. 26, 1959) 66 I. D. 97

A contractor who, in excavating for a septic tank and seepage pits, which were to be parts of a sewage disposal system for a school in a town in Alaska, encountered a water table that fluctuated seasonally, as well silt of a fluid consistency, although such conditions were

ADDITIONAL COMPENSATION--Continued

contrary to indications in the plans, with the result that the Government engineers to avoid health hazards had to redesign the sewage disposal system entirely, may be said to have encountered unanticipated conditions which were "changed conditions" within the meaning of the applicable contract provision, notwithstanding that the specifications included also a general caveatory provision with respect to soil conditions. The acceptance by the contractor of the change orders, which provided for the redesign of the sewage disposal system, did not bar it from requesting an equitable adjustment of its increased costs prior to the redesign of the system.

Appeal of Waxberg Construction Company, IBCA-144 (Mar. 31, 1959) 66 I. D. 123

When a contract for the construction of a bridge and culverts in Rock Creek Park included both unit and lump sum items, an approximate quantities provision of the specifications, which in terms was made applicable only to unit items did not in itself bar additional compensation for overruns in the lump sum items.

Additional compensation, sought after completion of all of the work, for an overrun in masonry work in the construction of a culvert in Rock Creek Park, due to a discrepancy between the drawings and one of the notes on the drawings, must be denied, where the contractor failed to comply with the terms of the contract and specifications which required that it call such discrepancies to the attention of the contracting officer and warned that any work performed without his determination would be at its own risk and expense.

Appeal of General Excavating Company, IBCA-150 (May 25, 1959)

When the Government in order to provide a maximum amount of water for irrigation purposes required the contractor to provide for storage of water in a reservoir above the maximum height designated in the contract, either by increasing the height of a temporary cofferdam previously constructed by the contractor or by increasing the height of the upstream edge of the partially completed embankment of the permanent dam, such requirement went beyond the provision of the specifications imposing on the contractor the obligation to take certain protective and control measures to divert and care for the stream during construction and therefore constituted a change, entitling the contractor to an equitable adjustment. However, Government instructions to avert the threat of flood damage or to discharge other contractual obligations, apart from the change in storage requirements, did not constitute a change, entitling the contractor to an equitable adjustment.

CONTRACTS--Continued

ADDITIONAL COMPENSATION--Continued

A claim for additional compensation by a contractor under the first category of the "changed conditions" clause of the contract, relating to divergent conditions, as distinguished from the second category of "changed conditions," relating to unanticipated conditions, on the ground that it encountered large quantities of hard material which, in view of the logs of subsurface exploration made available to it in the drawings, it could not reasonably have expected must be denied when the logs of exploration were outside the area to be excavated, and did not generally penetrate to grade, and in any event indicated that large quantities of hard material were present, and the presence of such hard material could have been ascertained by a more adequate site investigation. Whether or not logs of exploration can be regarded as unqualified representations must depend on the circumstances of each individual case. When a contract charges a contractor with the duty of investigating the site of the work, it must make such an investigation, whether or not it is asserting a changed condition in the first or the second category, unless indeed, the claim is based on a representation of such a nature that a site investigation would be completely pointless. However, the standard of adequacy in conducting a site investigation may well be less rigorous in first than in second category cases.

When the provisions of the specifications of a contract require the contractor to store inflow into a reservoir to a certain elevation and to provide temporary control works which should be capable of releasing water up to 250 cubic feet per second in the event permanent outlet works are not completed by a certain date, such works must be capable of passing 250 cubic feet per second during the whole irrigation season and not merely when the works were first constructed and water was released through them, since the need for water during the irrigation season is a continuing one. However, the contractor is entitled to an equitable adjustment if its costs were increased by failure of the Government to require a larger opening in the intake structure at the time when it was being built.

Appeal of Inter-City Sand and Gravel Co. and John Kovtynovich, IBCA-128 (May 29, 1959) 66 I. D. 179

A railroad construction contractor who was to rehabilitate mileage of The Alaska Railroad and, in so doing, was required by the terms of the specifications to effect two separate track lifts totaling six inches with new crushed ballast from a pit located at Spencer, Alaska, did not satisfy the requirement for one of these lifts when in the course of replacing and respacing the ties it gave the track an initial or out-of-face lift, and tamped the old ballast to achieve a sound road bed for the replaced and respaced ties, even though when the track was lowered back to the road bed it may have been higher than before the commencement of the operations.

CONTRACTS--Continued

ADDITIONAL COMPENSATION--Continued

As the out-of-face lift was either work that necessarily had to be performed to carry out the purposes of the contract, or was performed for the convenience of the contractor, it cannot qualify as extra work entitling the contractor to additional compensation. There was also nothing in the correspondence and negotiations relating to the approval by the contracting officer of the contractor's progress schedule which could be said to have effected a practical interpretation of the requirements of the specifications with respect to the track lifting operations inconsistent with their literal terms.

Appeal of William A. Smith Contracting Company, Inc., IBCA-83 (Jun. 16, 1959) 66 I. D. 233

Interest is not allowable as a part of an equitable adjustment under a standard form Government contract.

Appeal of Flora Construction Company, IBCA-101 (Sept. 4, 1959) 66 I. D. 315

The amount of the equitable adjustment to be made on account of a "change" or a "changed condition" may be determined on the basis of a fair and reasonable approximation of costs, arrived at by a studied consideration of the record as a whole. Cost tabulations made by either party, even though there is oral testimony as to their correctness, do not afford a satisfactory basis for an equitable adjustment if major discrepancies exist between such tabulations and the cost records from which they are represented as having been derived, or if other facts or circumstances reveal the existence of major errors in them.

Appeal of Caribbean Construction Corporation, IBCA-90 (Supp.) (Sept. 22, 1959) 66 I. D. 334

A contractor who experienced large overruns in estimated schedule quantities in compacting embankments under a contract containing an "approximate quantities" provision is not entitled to additional compensation under the "changed conditions" clause of the contract merely because of such overruns, notwithstanding that a mathematical error was made by the Government in estimating the schedule quantities, nor because it had to perform the additional work of compacting the embankments during the dry summer months when the amount of mcisture in the ground was less than in the winter or the spring. The contractor is also not entitled to an equitable adjustment under the "changes" clause, although errors in topography, resulting from the use by the Government of an inaccurate topographical map, increased the

CONTRACTS--Continued

ADDITIONAL COMPENSATION--Continued

quantities of the compacted embankments, since the nature of the work to be done was in no wise altered. However, to the extent that the overrun in quantities of compacted embankment was attributable to the errors in topography, the contractor may be entitled to an equitable adjustment under the "changed conditions" clause, in that the true topography could be regarded as a "latent" physical condition at the site differing materially from the indicated topography.

Appeal of Osberg Construction Company, IBCA-139 (Oct. 16, 1959) 66 I. D. 354

When a contractor has appealed from findings and decisions of a contracting officer, rejecting his claims for additional compensation and extensions of time for performance of the contract, which was for the construction of a fish cultural station, but has done no more to prosecute the appeal than to file a notice of appeal charging in general terms that the findings and decisions were erroneous, arbitrary, and unfair, the Board will only examine the record to the extent necessary to determine whether there were committed any errors manifest on its face.

Appeal of Sterling Engineering & Construction Company, Inc., IBCA-122 (Oct. 23, 1959)

A claim for additional compensation, sought by a contractor after completion of the work, for overruns in the work and materials in the construction of a bridge abutment on the Laguna Indian Reservation, due to a discrepancy between the estimated quantities indicated on the drawing and the work indicated on the drawing itself, against which the estimated quantities could have been checked, must be denied when it appears that the contractor failed to comply with the provision of the U. S. standard form of construction contract, requiring discrepancies in the drawings to be called to the attention of the contracting officer.

Appeal of W. H. Lynch, d/b/a Badger Lynch, Contractors, IBCA-173 (Oct. 27, 1959)

APPEALS

There is no statutory or contractual provision for appellate consideration by the Department of claims arising from work done under a purchase order.

Appeal of Goodfellow Bros., Inc., IBCA-17 (Jan. 10, 1955)

CONTRACTS--Continued

APPEALS--Continued

The appeal of a contractor from the decision of a contracting officer assessing liquidated damages against the contractor by reason of the late completion of the work under the contract must be dismissed when the contractor failed to give the contracting officer timely notice of the causes of the delay as required by article 9 of the contract. The consideration of the causes of delay by the contracting officer on the merits does not amount to a waiver of the requirement of notice, since the contracting officer could extend the time for giving notice only with the approval of the head of the Department.

Appeal of Campbell Construction & Equipment Co., IBCA-2 (Jan. 11, 1955) 62 I. D. 6

The burden of proof is on the contractor to establish claims for additional compensation and, in the absence of supporting data and evidence, the contracting officer's findings of fact must be accepted unless on the face of the record they appear to be erroneous.

Appeal of Lowdermilk Brothers, IBCA-10 (Feb. 11, 1955)

The appeal of a contractor from the decision of a contracting officer assessing liquidated damages against the contractor by reason of the late completion of the work cannot be considered on the merits when the contractor failed to give the contracting officer notice of the causes of the delay as required by Article 9 of the standard form of Government construction contract. The consideration of the causes of delay by the contracting officer on the merits does not amount to a waiver of the requirement of notice, since the contracting officer could extend the time for giving notice only with the approval of the head of the Department. Although the head of the Department had delegated to the heads of bureaus the authority to extend the time for giving notice, and had authorized them to redelegate the authority to their subordinates by order published in the Federal Register, no effective redelegation was accomplished in this case, since the Commissioner of Reclamation authorized his contracting officers to extend the time for giving notice by means of an unpublished instruction in the Bureau of Reclamation manual.

A contractor who bids on a Government contract is charged with the obligation of having available whatever machinery and labor may be necessary to execute the contract, and the burden of proving that delays were excusable rests upon the contractor who has taken an appeal.

Appeal of S. J. Groves & Sons Company, IBCA-8 (April 12, 1955) 62 I. D. 145

CONTRACTS--Continued

APPEALS--Continued

The Board may not consider a claim which represents an offer in compromise.

Appeal of M. Hoard, IBCA-6 (May 11, 1955)

The fact that the contractor excepts his claim of additional compensation in executing his release on the contract merely saves whatever rights he had, and is in no way a concession by the Government that his claim is valid, and such exception does not serve to improve the legal position of the contractor, in the absence of statements by the contracting officer which would lead the contractor to believe that his signing of the change order would be conditional.

Appeal of Sam Bergesen, IBCA-11 (Aug. 1, 1955) 62 I. D. 295

While an appeal opens up the entire record, and the Board may, upon urging by counsel for the Government, disallow an extension of time granted by the contracting officer, by reason of unusually severe weather, where the contracting officer's calculations were not entirely correct, and when several factors in the case, including the average number of days of windstorm and rainstorm are obscure, the Board will not disturb the contracting officer's decision.

Appeal of Jeneckes', IBCA-44 (Nov. 28, 1955) 62 I. D. 449

Where no new considerations have been presented to the Board, a request for reconsideration will be denied.

Appeal of Sam Bergesen (On Reconsideration), IBCA-11 (Dec. 19, 1955)

Where the contractor has failed to prosecute its appeal by pointing out why the contracting officer's findings and decision are deemed erroneous, the findings and decision of the contracting officer must be accepted unless it appears on the very face of the record that they are erroneous, since the burden of proof is on the contractor to substantiate a claim.

Appeal of Gila Construction Company, Inc., IBCA-46 (Dec. 20, 1955)

Where no new considerations have been presented to the Board and no material errors in its decision have been shown, a request for reconsideration should be denied.

CONTRACTS--Continued

APPEALS--Continued

The authority exercised by the Board of Contract Appeals is final for the Department.

Appeals of Carson Construction Company, IBCA-21, IBCA-25, IBCA-28, IBCA-34 (Mar. 9, 1956)

The postmark on the envelope in which a notice of appeal was received is evidence that the envelope and its contents passed through the mails at the time and place stated in the postmark, and is a circumstance from which the date when the notice of appeal was first deposited in the mails may legitimately be inferred by the trier of the fact.

Under a Government contract that contains the usual form of "disputes" clause, providing that decisions of the contracting officer concerning questions of fact arising under the contract shall be final and conclusive unless appealed from within 30 days, an appeal from a decision of the contracting officer must be dismissed if the notice of appeal was not mailed or otherwise furnished to the contracting officer within the 30 days allowed by the contract.

The deposit in the mails of a notice of appeal enclosed in an envelope that is properly addressed, and has stamps for the correct amount of postage affixed, creates a rebuttable presumption of fact that the notice of appeal is delivered to its destination in the ordinary course of the mails.

The date borne by a notice of appeal is not proof that it was actually mailed on that date.

Appeal of Emsco Manufacturing Company, IBCA-66 (Apr. 6, 1956) 63 I. D. 92

As releases obtained by the Government by means of the exertion of economic duress have been treated as unilateral decisions of the contracting officer that are subject to appeal under the disputes clause of Government construction contracts, a release which should not have been accepted by the Government may similarly be treated as the unilateral act of the contractor and may be disregarded by the administrative reviewing authority on appeal. Although such an authority may not reform contractual instruments, the disregard of the release under such circumstances does not constitute an affirmative act of reformation.

Appeal of United Concrete Pipe Corporation, IBCA-42 (May 31, 1956) 63 I. D. 153

CONTRACTS--Continued

APPEALS--Continued

Although in general a contractor who has taken an appeal should be prepared to substantiate the claim before the Board with reasonable promptness, and should not, indeed, present the claim unless he has reason to suppose that it is meritorious, the Board will grant a request of the contractor that consideration of the claim by the Board be deferred pending the outcome of litigation between the contractor and his subcontractor when counsel for the Government does not object, and it appears from the nature of the claim that the interests of the Government will not be prejudiced. Although the present case will be marked "closed" on the Board's docket, the contractor may file a request that it be reopened, within a reasonable time after the determination of the litigation in which it is involved.

Appeal of Osberg Construction Company, IBCA-32 (June 19, 1956) 63 I. D. 180

The Board of Contract Appeals is not authorized to determine an appeal by a contractor in the absence of a finding of fact or decision by the contracting officer.

Appeal of Gila Construction Company, Inc., IBCA-79 (Sept. 21, 1956) 63 I. D. 378

The timeliness of an appeal is governed by the time that elapsed between the date when the findings of fact and decision were received by the contractor and the date when the notice of appeal was mailed to the contracting officer, and not by the time that elapsed between the date when the findings of fact and decision were received by a subcontractor for whose benefit the contractor is prosecuting the appeal and the date when the appeal papers were mailed to the contractor by the subcontractor.

Under a Government contract that contains the usual form of "disputes" clause, an appeal from a decision of the contracting officer must be dismissed if the notice of appeal was not mailed or otherwise furnished to the contracting officer within the 30 days allowed by the contract. The Board has no authority to waive this limitation or otherwise extend the 30-day period.

Appeal of Wiscombe Painting Company, IBCA-78 (Oct. 26, 1956)

An appeal may be decided upon a theory not advanced by the parties if such theory is consistent with the facts of record or legitimate inferences from such facts.

CONTRACTS--Continued

APPEALS--Continued

A motion for reconsideration based upon the existence of an alleged practice or custom not established by the record must be denied when the party alleging such practice or custom had an opportunity to prove its existence at the hearing, when the practice or custom is not alleged to be invariable, when the record reveals circumstances inconsistent with the alleged practice or custom, and when it is doubtful that proof of the existence of the practice or custom would justify a different decision than was rendered.

Appeal of Paul C. Helmick Company, IBCA-39 (Oct. 31, 1956) 63 I. D. 363

Under the "disputes" clause of the standard form Government contracts, the Board of Contract Appeals is without jurisdiction to entertain a claim upon which no finding of fact or decision has been made by the contracting officer, even though such claim is presented to the Board in the same appeal with another claim that is within the jurisdiction of the Board.

Where the record before the Board of Contract Appeals with respect to a claim for extensions of time by reason of various unforeseeable causes of delay contains material information that was not before the contracting officer, but where this information is not sufficient to enable the Board to determine the precise extensions of time to which the appellant may be entitled, the Board will remand the case to the contracting officer for redetermination of the merits of the claim in the light of such additional information, any supporting proof that the appellant may choose to submit, and the comments of the Board as to the legal principles that should be applied by the contracting officer in making such redetermination.

Appeal of Urban Plumbing and Heating Company, IBCA-43 (Nov. 21, 1956) 63 I. D. 381

As questions of the interpretation of contracts are not "questions of fact" within the meaning of that expression in the "disputes" article of standard form Government contracts, a contractor may resort directly to the courts upon such a question without securing a finding of fact or decision by the contracting officer or taking an appeal to the Board of Contract Appeals.

The Board of Contract Appeals is not authorized to determine an appeal by a contractor in the absence of a finding of fact or decision by the contracting officer.

CONTRACTS--Continued

APPEALS--Continued

The Board of Contract Appeals is not authorized to review a final settlement made by the Comptroller General under his statutory authority.

Appeal of Economy Pumps, Inc., Division of C. H. Wheeler Manufacturing Company, IBCA-94 (Feb. 13, 1957)

When a contracting officer withheld from payments due under a contract sums to cover contingent liabilities of a contractor by reason of alleged labor violations being investigated by him and by the Department of Labor, but made no findings of fact with respect to the alleged labor violations and merely informed the contractor that the matter was being referred to the Comptroller General, and when the contractor never requested the contracting officer to make findings of fact with respect to the alleged labor violations and did not complain of the withholding in its notice of appeal, but only in a subsequent brief, neither the issue of the alleged labor violations nor the propriety of the withholding is properly before the Board of Contract Appeals. The submission of the matter to the Comptroller General did not constitute a finding of fact or decision within the meaning of the "disputes" article of the contract, or of the regulations of the Board.

The Board of Contract Appeals lacks jurisdiction to consider a claim for additional compensation when no appeal was taken from the contracting officer's decision rejecting the claim within the time specified in the "disputes" clause of the contract.

Appeal of Tri-State Construction Co., IBCA-63 (Feb. 26, 1957) 64 I. D. 38

During the period of 30 days allowed for the taking of an appeal from a contracting officer's decision, made pursuant to the "disputes" clause of the standard form Government contracts, the contracting officer may withdraw or change his decision; and, if he does so before an appeal has been taken, the running of the original period of 30 days is tolled, and a new period commences to run at such time as the contractor receives a copy of an amendatory or substitute decision. A communication from a contracting officer to a contractor, in order to amount to a decision that will start running the period for appeal, must, at least, be so worded as fairly and reasonably to inform the contractor that a determination under the "disputes" clause is intended.

CONTRACTS--Continued

APPEALS--Continued

A contractor who claims that the contracting officer erred in denying a request for an extension of time, whether in whole or in part, has the burden of proving the existence of facts sufficient to support the granting of such extension of time, or of so much thereof as was denied by the contracting officer.

Appeal of Central Wrecking Corporation, IBCA-69 (Mar. 29, 1957) 64 I. D. 145

Under a Government contract which provides for the taking of an appeal within 30 days, but does not specify with particularity either the event that starts or the event that stops the running of this period, the time for appeal begins to run when the contractor actually receives its copy of the decision of the contracting officer, and an appeal that is not mailed by the contractor until more than 30 days after the receipt of such copy is not timely and must be dismissed for lack of jurisdiction.

Appeal of Bennett Industries, Inc., IBCA-102 (Apr. 23, 1957) 64 I. D. 113

The Board lacks jurisdiction to grant relief to a contractor under a Government supply contract in a case in which the contractor, upon being asked by the contracting officer to verify its bid, informed the latter that it had intended to make the bid but could no longer perform because of an increase in costs since the bid was made. The relief which the appellant contractor seeks seems to be either that the Board declare that no contract between the parties ever resulted or, if a contract was made by the parties, that the Board reform or rescind it. If there was no contract, the Board whose jurisdiction is contractual, could not act. If, on the other hand, a contract was made, relief could be granted only on the ground of a mistake in bid, and only the Comptroller General or the courts could afford such relief.

Appeal of Stainless Piping Supply, Inc., IBCA-106 (May 6, 1957)

When no grounds were established on which a motion for reconsideration could be sustained, the motion must be denied.

Appeal of Texas Construction Company and Hyde Construction Company, IBCA-73 (June 18, 1957)

CONTRACTS--Continued

APPEALS--Continued

When the contracting officer has considered claims on their merits, they are not barred by the failure of the contractor to comply with the procedural requirement of written notice of the claims, and the circumstance that the claims may have been considered by the contracting officer on the merits only as a matter of grace, may not be given any weight by the Board of Contract Appeals in assessing the merits of the claims on appeal.

Appeal of Caribbean Construction Corporation, IBCA-90 (June 28, 1957) 64 I. D. 254

The Board of Contract Appeals will not entertain a claim upon which no finding of fact or decision has been made by the contracting officer.

Appeal of Elmer A. Roman, IBCA-57 (June 28, 1957)

A request for reconsideration, based either on grounds already considered and still deemed inadequate by the Board of Contract Appeals, or on factual allegations unsupported by any evidence in the record, must be denied.

Appeal of Caribbean Construction Corporation, IBCA-90 (July 19, 1957)

A contract may be terminated for the convenience of the Government even though it contains no express provision for such termination, the Government having an inherent right to terminate the contract. When a contract has been so terminated, however, the action cannot be regarded as having been taken pursuant to the "disputes" clause of the contract. Hence, the 30-day time limitation for taking appeals that exists under that clause is inapplicable, and an appeal may be considered by the Board, although it has been taken subsequent to the expiration of that period. The regulation governing the taking of appeals should be construed as permitting the consideration of such an appeal.

Appeal of D. R. Haddox, IBCA-84 (July 19, 1957)

The Board of Contract Appeals is not authorized to determine an appeal that was taken before there was any finding of fact or decision by the contracting officer upon the matter in dispute.

CONTRACTS--Continued

APPEALS--Continued

The provisions of the "disputes" clause of the standard forms of Government contracts are jurisdictional, and preclude review of the contracting officer's decisions upon questions of fact arising under the contract unless an appeal is taken within the 30 days allowed for that purpose by the "disputes" clause. The Board of Contract Appeals has no authority to waive this limitation or otherwise extend the 30-day period.

Appeal of Westinghouse Electric Supply Company, IBCA-107 (July 30, 1957)

When there has been a failure to make provision in a contract for the assessment of liquidated damages, such damages may not be assessed against the contractor notwithstanding his failure to urge this as a ground for reversal. Such failure is not an example of "practical construction" of the contract by the parties, which has to do with interpretation of its terms during the period of performance.

Appeal of Fred Saulsberry, IBCA-65 (Sept. 13, 1957) 64 I. D. 357

A claim for additional compensation made by a tunneling contractor on the ground that the omission of certain drill hole information from the drawings was a material misrepresentation is a claim for unliquidated damages which could not be considered by the contracting officer, and may not be considered by the Board on appeal.

Appeal of J. A. Terteling & Sons, Inc., IBCA-27 (Dec. 31, 1957) 64 I. D. 466

When the Board of Contract Appeals held in disposing of an appeal that the obligation of a contractor to restore a wasteway structure damaged by a storm was limited to establishing only so much of "the former earth surfaces" as would be reasonably necessary to admit of the restoration and completion of the wasteway structure, the extent of the obligation of the contractor was not limited to work within the pay or neat lines, since the Board also held that the contractor was required to fill eroded areas to the extent necessary for the restoration and completion of the contract work.

Appeal of Barnard-Curtiss Company, IBCA-82 (Supp.) (Jan. 23, 1958) 65 I. D. 49

CONTRACTS--Continued

APPEALS--Continued

A petition for rehearing based on a theory considered but rejected by the Board must be denied when the petitioner has advanced no reason for adopting the theory.

Appeal of Barnard-Curtiss Company, IBCA-82 (Mar. 5, 1958)

A factual statement by a contractor in a notice of appeal is a mere allegation of what the contractor asserts to be the facts, and, if disputed by the Government, cannot be accepted as proof that the facts so asserted are true.

In an appeal attacking the validity of a finding of fact or decision by a contracting officer, not patently erroneous, it is incumbent upon a contractor who advances a claim against the Government that was denied by such finding or decision to come forward with evidence showing error therein, and in the absence of such evidence the Board of Contract Appeals cannot properly overrule the decision of the contracting officer. In such a case the burden of the appeal is upon the contractor's shoulders, and that burden calls for evidence on the contractor's side to show that the action taken by the contracting officer was erroneous, for the findings of a contracting officer are presumed to be correct in the absence of proof to the contrary.

Appeal of Duncan Construction Company, IBCA-91 (Apr. 2, 1958) 65 I. D. 135

Claims of a contractor engaged in the construction of two substations for the Bonneville Power Administration based on charges of misconduct of the inspectors in supervising the work must be rejected when (1) the evidence in support of the claims is extremely stale; (2) the contractor in appealing has not requested a hearing at which the witnesses with knowledge of the events could be heard and subjected to cross-examination; (3) the top officials of Bonneville who were aware of the contractor's charges visited the site of the work for the purpose of investigating the charges, and after investigation found them to be groundless; (4) there is independent evidence of the good character and competence of the inspectors; (5) there were numerous shortcomings in the performance of the contractor's work that might have motivated his countercharges; (6) the charges are based on misunderstandings of the situations from which they arose; and, finally, (7) the charges run counter to inherent probabilities and are otherwise not credible.

Appeal of W & W Company, IBCA-54 (Aug. 4, 1958)

CONTRACTS--Continued

APPEALS--Continued

Appeals from decisions of contracting officers which involve a question of law are not subject to the 30-day limit prescribed in the "disputes" clause of the standard Government construction contract, since that clause relates only to disputes "concerning a question of fact."

Appeal of Gustav Hirsch Organization, Inc., IBCA-175 (Oct. 30, 1958)

A contractor who seeks an extension of time under a standard form construction contract because of an alleged excusable cause of delay has, in general, the burden of proving that the alleged cause of delay actually existed, that it met the criteria of excusability prescribed by the contract, that it delayed the orderly progress or ultimate completion of the contract work as a whole, and that it did so for a given period of time.

Appeal of Larsen-Meyer Construction Co., IBCA-85 (Nov. 24, 1958) 65 I. D. 463

The fact that an appellant, who was seeking, while its appeal was pending before the Board of Contract Appeals, the settlement on the administrative level of a dispute arising from the performance of its contract for the construction of a dike across a marsh did not specifically consent that the Administrative Assistant Secretary of the Department submit the questions of law involved in the dispute to the Comptroller General for his opinion does not make the pronouncements of the Comptroller General on these questions of law any the less binding on the Board, for the power of the Department to request the Comptroller General's opinion did not depend on the consent of the appellant, and the Board is bound by the opinion of the Comptroller General on the questions of law duly determined by him. However, the opinion of the Comptroller General was rendered on an assumed state of facts, and the Board is not barred from deciding disputed questions, whether of fact or of law, that were not considered or determined by the Comptroller General.

Appeal of Reid Contracting Company, Inc., IBCA-74 (Dec. 19, 1958) 65 I. D. 500

Where a contractor fails to prosecute an appeal with reasonable diligence, as by failing to respond for many months to an inquiry from the Board of Contract Appeals concerning the question whether the appeal has not become moot by reason of circumstances transpiring after its filing, the appeal will be dismissed for want of prosecution.

Appeal of Parker-Schram Company, IBCA-119 (Jan. 28, 1959)

CONTRACTS--Continued

APPEALS--Continued

If a timely notice of appeal from findings of fact of a contracting officer, when considered with the documents referred to therein and contained in the appeal file, states with sufficient particularity the grounds of the appeal, a Government motion to dismiss the appeal because the contractor failed to file on time a brief in support of the appeal will be denied. However, in view of the failure of the contractor to reply to the motion to dismiss or offer any excuse for the tardy filing of the brief, the Board will disregard the brief in support of the appeal.

Appeal of Flora Construction Company, IBCA-180 (Mar. 2, 1959)

The failure of a contractor to give timely notice of a claim is waived when the contracting officer considers the claim on its merits without invoking such failure as a reason for its denial.

Appeal of J. W. Merz, IBCA-64 (Mar. 10, 1959)

When the 15-day period prescribed for the filing of a supporting brief addressed to the Board of Contract Appeals expires on a Sunday, the contractor has until the following day to complete the filing with the Board.

Under the regulations applicable to contract appeals, a notice of appeal need not state the reasons why the decision appealed from is deemed erroneous, provided such reasons are stated in the supporting brief authorized by the regulations.

The unintentional misdirection of a supporting brief in a contract appeal by mailing it directly to the Board of Contract Appeals rather than to the Board through the contracting officer, as required by the regulations does not in itself justify the dismissal of an otherwise proper appeal.

Appeal of Henly Construction Company, Inc., IBCA-165 (Mar. 18, 1959)

A motion for reconsideration of a claim of a roadway contractor based on the allegation that the Government by deleting a select borrow surface course, which the contractor had planned to use to correct deficiencies in the subgrade, and by failing to supply suitable topping material for finishing the subgrade both prior and subsequent to the deletion, had increased the contractor's costs in finishing the subgrade must be denied when it appears that (1) the contractor has not borne the burden of proving that it made every reasonable effort to conserve suitable topping material from excavation and borrow, as required by the specifications, and

CONTRACTS--Continued

APPEALS--Continued

that the Government failed to designate borrow pits from which suitable topping material could be obtained; (2) the initial grading by the contractor had been very rough; (3) the gravamen of the contractor's complaint was really that too much of the borrow material had to be windrowed rather than that it was unsuitable; (4) the contractor's alleged plan to make good the deficiencies of the subgrade with select borrow was an afterthought and the alleged plan would in any event have been inconsistent with the requirements of the specifications relative to the laying down of the subgrade, and might have involved greater expense than the use of ordinary borrow; and, finally, (5) the contractor failed to give timely notice of and protest against the alleged denial of suitable topping material.

A request of a roadway contractor for reconsideration of a borrow claim, which is based on the contention that the Board could not give effect to deviations from the "changes" and "changed conditions" clauses of the U. S. standard form of construction contract that limited the applicability of these clauses because deviations were prohibited by the regulations relative to public contracts, must be denied. Such regulations are simply for the protection of the Government against its own officers, and hence may not be enforced against the Government by a contractor seeking to avoid the obligation of its contract. Moreover, although the courts have declared the standard "changes" and "changed conditions" clauses to be paramount as against caveatory or exculpatory provisions in the specifications of a general nature, this is not equivalent to a prohibition upon deliberate deviations. The standard provisions are paramount as against inconsistent specifications only in cases in which there is no other aid to interpretation than the provisions of the standard form itself.

Appeal of Morrison-Knudsen Company, Inc., IBCA-36 and IBCA-50 (Mar. 23, 1959) 66 I. D. 71

When it is apparent from the whole record that in taking their appeal the contractors are not only requesting extensions of time but also additional compensation for extra work, and that the contracting officer intended to deny such additional compensation, the Board will direct the contracting officer to determine the amount of such additional compensation, notwithstanding the defects of the formal claims of the contractors.

Appeal of Cox and Haddox, IBCA-155 (Mar. 26, 1959) 66 I. D. 97

Although the "disputes" clause of the U. S. standard form of construction contract provides that in connection with an appeal the contractor shall be afforded an opportunity to offer evidence in support of its appeal, and the regulations governing procedure before the Board provide for a hearing if the appeal involves disputed issues of fact, they contemplate that a hearing for the purpose of taking testimony shall be mandatory only when appellant has tendered issues of fact that are genuine and material.

CONTRACTS--Continued

APPEALS--Continued

Hence, a request for a hearing made by a contractor engaged in constructing an access road to a Bonneville transmission line who pleads no excusable cause of delay but attacks the validity and effect of the liquidated damages provision itself need not be granted, and the appeal may be decided on the written record. In particular, no genuine and material issue of fact is raised by the allegation that unnamed Bonneville inspectors assured the contractor that there was no urgent need for the access road, since such assurances would be unauthorized even if made, and hence could not form the basis for a waiver of the liquidated damages provision. The fact that the liquidated damages imposed on the contractor exceeded the amount of the consideration for the performance of the work is in itself immaterial.

Appeal of Parker-Schram Company, IBCA-96 (Apr. 7, 1959) 66 I. D. 142

A contracting officer's findings that the drawings submitted to bidders and incorporated in the executed contract contained data from which in about 2 hours' time a qualified person could prepare an estimate of quantity which would have revealed that the material to be excavated did not exceed the quantity that was ultimately removed, deals with technical engineering questions which are essentially questions of fact under the "disputes" clause of the standard form of Government construction contract. Hence, an appeal from such findings must be taken within 30 days from receipt of the findings.

When the 30th or last day on which an appeal may be taken from findings of fact under the "disputes" clause falls on a State holiday not declared by the Congress to be a legal public holiday, the time for taking the appeal is not extended to the next business day.

Appeal of Bushman Construction Company, IBCA-193 (Apr. 23, 1959) 66 I. D. 156

The Board of Contract Appeals will not determine an appeal by a contractor in the absence of findings of fact and a decision by the contracting officer.

Appeal of General Excavating Company, IBCA-150 (May 25, 1959)

Upon an appeal from a decision of a contracting officer under a contract for the sale of scrap iron and steel by The Alaska Railroad, the Board of Contract Appeals has jurisdiction to determine the respective obligations of the Government and the purchaser, and hence may construe the terms governing the shipment of

CONTRACTS--Continued

APPEALS--Continued

the purchased property in order to decide what its destination was and at what point the railroad could apply its tariffs to the shipment.

Appeal of Commercial Metals Company, IBCA-99 (Aug. 27, 1959) 66 I. D. 298

Under the rules governing procedure before the Board of Contract Appeals a request for reconsideration that is mailed within the period allowed for the filing of such requests, but that is not delivered until after the end of that period, is not timely.

A request for reconsideration will be denied where it concedes the existence of a fact that would preclude allowance of the claim for which reconsideration is sought.

Appeals of Inter-City Sand and Gravel Co. and John Kovtynovich, IBCA-128 (Aug. 27, 1959) 66 I. D. 313

Where the contracting officer fully informs a contractor of the right of appeal and of the necessary procedural steps to be taken, and appellant remains inactive and silent and does not perfect appeal, the appeal will be dismissed for lack of prosecution.

Appeal of Henkle and Company, IBCA-212 (Sept. 15, 1959) 66 I. D. 331

When a contractor has appealed from findings and decisions of a contracting officer, rejecting his claims for additional compensation and extensions of time for performance of the contract, which was for the construction of a fish cultural station, but has done no more to prosecute the appeal than to file a notice of appeal charging in general terms that the findings and decisions were erroneous, arbitrary, and unfair, the Board will only examine the record to the extent necessary to determine whether there were committed any errors manifest on its face.

Appeal of Sterling Engineering & Construction Company, Inc., IBCA-122 (Oct. 23, 1959)

Where a contracting officer withdraws findings of fact from which an appeal has been taken, where the appellant concurs in such withdrawal, and where no reason for denying effect to such withdrawal appears, the withdrawal will be confirmed and the appeal will be dismissed.

Appeal of Layne and Bowler Export Corporation, IBCA-225 (Nov. 19, 1959)

CONTRACTS--Continued

APPEALS--Continued

A request for reconsideration will be denied where no facts or arguments in support of the request have been presented, and the time allowed therefor has expired.

Appeal of Flora Construction Company, IBCA-101 (Nov. 20, 1959)

The Board lacks jurisdiction in absence of a disputes provision in the contract.

Appeal of Ocean Tow, Inc., IBCA-105 (Dec. 3, 1959) 66 I. D. 409

The Board of Contract Appeals is not authorized to determine an appeal in the absence of a findings of fact or decision by the contracting officer.

In absence of presentation of proof by appellant, the Board will only examine the record to the extent necessary to determine whether there were committed any errors manifest on its face.

Appeal of Francis O. Day Co., Inc., IBCA-178 (Dec. 4, 1959)

Appeal will not be dismissed as untimely when appellant appeals from a letter meeting the minimum requirements of a findings of fact and decision within the 30-day period. Findings of fact and decision which do not meet minimum requirements need not be appealed.

Appeal of Irvin Prickett & Sons, Inc., IBCA-203 (Dec. 5, 1959)

AUTHORITY TO MAKE

Even if the location of a canal might have been materially different from that shown on the drawing, the Government would not be bound by any assurances orally given prior to the bidding by a subordinate of the contracting officer not authorized to give them. Moreover, even if so given, they would have no effect unless embodied also in the written contract, since it is well settled that the written contract merges all prior negotiations and is presumed to express the final understanding of the parties. In so far as the claim may be based upon misrepresentation, it would not be cognizable by the Board.

Appeal of Korshoj Construction Co., Inc., IBCA-9 (May 2, 1956) 63 I. D. 129

CONTRACTS--Continued

AUTHORITY TO MAKE--Continued

A contract by an Osage Indian to make a will disposing of his Osage Indian headright is invalid because an interest in such headright owned by a person of Indian blood cannot be alienated.

Bismark Mosier, IA-150 (July 20, 1956) 63 I. D. 205

BIDS

Generally

The failure to submit a bid form prior to bid openings is an informality which may be waived when in the interest of the Government where the intention to submit a bid is otherwise sufficiently evidenced by the submission of a properly executed bid bond together with a signed Standard Form 23 (Construction Contract) which specifies the amount bid and refers to the contract specifications by number.

Memorandum from Regional Solicitor, Los Angeles Region to Project Manager, Boulder Canyon Project, dated June 6, 1955 (re contract to install doors in Boulder Canyon Project Administration Building)

A contractor who prior to the acceptance of its bid agreed to be bound by an expected redetermination of minimum wage rates by the Department of Labor is not entitled to additional compensation by reason of paying such wage rates, which were generally higher than the previous ones, when under the regulations of the Department of Labor governing wage determinations, such determinations did not become obsolete until more than 90 days had elapsed since the award of the contract to which the rates applied, and the contract was awarded within this period. Under the circumstances of the present case, the contract was awarded when the contracting officer finally notified the contractor that he had been awarded the contract rather than when the contract and bond forms were forwarded to the contractor for preliminary examination and execution.

Appeal of J. D. Armstrong Company, Inc., IBCA-40 (Aug. 17, 1956) 63 I. D. 289

CONTRACTS--Continued

BIDS--Continued

Generally--Continued

Where in accordance with the statute and regulation the notice of sale of a competitive oil and gas lease reserves the right to reject any and all bids, and only one bid is received for a particular parcel, that bid may properly be rejected for the reason that it is too low.

C. C. Thomas, A-27380 (Nov. 7, 1956)

Where a tract of land offered for public sale as an isolated tract is determined to be prospectively valuable for uranium, the manager may determine that the land should not be sold even though a bidder has been declared purchaser since the pertinent regulation gives the manager authority to make such a determination at any time up to the issuance of the cash certificate.

Buck Willcoxson, A-27402, A-27403 (Dec. 17, 1956)

As the Comptroller General has held that the term "accompanying papers" in paragraph 5(b) of U. S. Standard Form 23A is not broad enough to include an Invitation for Bids, and the provision for liquidated damages in the present case, although mentioned in the Invitation for Bids, was not included in the contract itself, made on U. S. Standard Form 23, the Government may not assess liquidated damages against the contractor for failure to perform the contract within the stipulated time. The ruling of the Comptroller General is no less applicable because the contracting officer in transmitting the contract to the contractor also sent him a purchase order for the same work. Since the contractor had agreed only to execute the standard form of construction contract, the purchase order must be regarded as an extraneous and unilaterally issued document.

Appeal of Fred Saulsberry, IBCA-65 (Sept. 13, 1957) 64 I. D. 357

Except for factors bearing directly on price, such as cost of delivery and discounts, bids may not be evaluated on any basis not specifically stated in the Invitation for Bids. As a general rule, the Invitation for Bids must set forth any special elements which will be factors in the evaluation of the bids for awards and a reasonable basis for the evaluation of any such special elements. Indefinite and speculative elements cannot be made express evaluation factors. 35 Comp. Gen. 282 (1955).

Amount of Estimated Income Tax is not a Factor Which can be Considered in the Comparison of Bids, M-36492 (Jan. 23, 1958)

BIDS--Continued

Generally--Continued

When, through clerical error, the continuation sheet make-up of an invitation to bid for the supply of substation equipment and steel framework left doubt as to whether references therein to potheads, cable and conduit were intended to constitute a single subitem or three separate subitems, and the bidder, although on the continuation sheets it expressly excluded only potheads, nevertheless incorporated in the specifications that accompanied its bid an express exclusion of potheads, cable and conduit, the contract resulting from acceptance of the bid must be interpreted as not embracing any of these three categories of materials, even though the acceptance of the bid mentions only potheads as being excluded.

Appeal of Westinghouse Electric Corporation, IBCA-134 (Supp.) (Apr. 30, 1958) 65 I. D. 203

A claim of a contractor for an extension of time based on the theory that the Government was obligated to notify it immediately of the award of the contract must be rejected when under the terms of the bid form the Government was allowed 60 days to accept or reject the bid, and notification was given long before the expiration of this period. Moreover, since bids are opened publicly, the contractor could readily have ascertained whether it was the successful bidder.

Appeal of Black Hills Ditching Co., Inc., IBCA-145 (Aug. 15, 1958) 65 I. D. 342

Under a contract providing for the installation and leasing by the contractor of an FM radio communications system in the Great Smoky Mountains National Park, the contractor is entitled to rental payments on a 12-month basis for the operation of three repeater stations incorporated by it in the bid schedule, notwithstanding the fact that the repeater stations were subsumed under a general provision of the schedule calling for operation of the relevant control points on a 5-month basis, when it appears that (1) the specifications contemplated that bidders could modify the bid schedule; (2) the communication system would not function without the operation of the repeater stations all 12 months of the year; and (3) this was made clear by a technical proposal accompanying the bid, together with an explanatory covering letter, which was accepted by the contracting officer as part of the contract.

Appeal of Land-Air, Inc., IBCA-192 (Nov. 30, 1959) 66 I. D. 402

BIDS--Continued

Mistakes

The Board of Contract Appeals lacks authority to grant relief where a mistake in bid has been made and discovered after award of the contract. Such administrative authority rests exclusively with the Comptroller General.

Appeal of L. D. Shilling Company, Inc., IBCA-23 (Aug. 19, 1955)

The Board lacks jurisdiction to grant relief to a contractor under a Government supply contract in a case in which the contractor, upon being asked by the contracting officer to verify its bid, informed the latter that it had intended to make the bid but could no longer perform because of an increase in costs since the bid was made. The relief which the appellant contractor seeks seems to be either that the Board declare that no contract between the parties ever resulted or, if a contract was made by the parties, that the Board reform or rescind it. If there was no contract, the Board whose jurisdiction is contractual, could not act. If, on the other hand, a contract was made, relief could be granted only on the ground of a mistake in bid, and only the Comptroller General or the courts could afford such relief.

Appeal of Stainless Piping Supply, Inc., IBCA-106 (May 6, 1957)

When a supplier maintains that by excluding potheads from its bid it also intended to exclude cable and conduit but that it was misled in conveying its intention by an ambiguity in the form of the invitation, its appeal from a decision of the contracting officer, which was that the supplier was obligated to furnish the cable and conduit, presents an issue of the interpretation of the bid rather than one of mistake in bid. The circumstances of the bid also involve perhaps an issue whether a valid contract at all was made. The interpretation of a bid is a question of law which is within the jurisdiction of the Board.

Appeal of Westinghouse Electric Corporation, IBCA-134 (Jan. 30, 1958) 65 I. D. 45

BREACH

While the issuance by the Government of a stop order which is not justified by the terms of the contract between the Government and the

CONTRACTS--Continued

BREACH--Continued

contractor, and which is extraneous to the performance of the contract itself, is a breach of contract, and a claim arising therefrom is one for unliquidated damages, a stop order which constitutes a change in the contract or in the performance of work required by the specifications under the contract entitles a contractor to additional compensation as an equitable adjustment pursuant to the "changes" clause of the standard contract.

Appeal of Guthrie Electrical Construction, IBCA-22 (July 22, 1955) 62 I. D. 280

A claim for additional compensation because of alleged tackiness, incorrect numbering, and poor legibility of aperture cards furnished by the Government to a supply contractor under a contract providing for the establishment of an index of the public land records of the United States that contains "changes" and "extras" articles, but no "changed conditions" article, constitutes a claim for unliquidated damages for breach of contract or misrepresentation, rather than a claim based upon a change in or an addition to the contract, and, therefore, is beyond the jurisdiction of the Board of Contract Appeals to decide.

Appeal of York Tabulating Service, Inc., IBCA-126 (Mar. 7, 1958) 65 I. D. 120

An allegation by a contractor who was awarded a contract for the improvement of the public land records of the United States in the State of Utah that before its bid is accepted, the Government possessed sufficient information to infer that the estimated quantities of work were erroneous might form the basis of an action for recision of the contract or for damage for breach of contract, but not for relief by the Board.

Appeal of Petroleum Ownership Map Company, IBCA-110 (May 29, 1958) 65 I. D. 261

BUY AMERICAN ACT

Executive Order 10582 of December 17, 1954 (3 CFR, 1954 Supp., 96), applies to construction contracts as a matter of departmental policy and legal determination. Cf. 36 Comp. Gen. 718 (1957). The applicability of the Buy American Act (41 U. S. C. sec. 10b), to construction contracts extends only to construction materials and their components used in the construction.

Applicability of Executive Order 10582 to Construction Contracts, M-36488 (Mar. 17, 1958)

CONTRACTS--Continued

CHANGED CONDITIONS

Regulations of the United States Coast Guard restricting the unloading of explosives, which may increase the contractor's costs, are not a changed condition within the meaning of Article 4 of standard contract form 23 (Construction). The term, "unknown conditions of an unusual nature," in this article, is generally applicable to physical conditions. In issuing such regulations, the Government is acting in its sovereign capacity, and a claim for extra compensation resulting therefrom must be regarded as a claim for unliquidated damages which may not be allowed by an administrative officer of the Government.

Appeal of McLaughlin-Incorporated, IBCA-18 (Jan. 13, 1955)

Notwithstanding specifications that include provisions that materials excavated will not be classified for payment and that the item of the schedule for excavation includes all required excavation, a motion to dismiss a claim for additional compensation for excavation alleged to include rock of a monumental nature must be denied, when the contract also includes article 4, the "changed conditions" article of the standard form of Government construction contract, since the contract must be read as a whole, and effect given to all of its provisions.

Appeal of L. D. Shilling Company, Inc., IBCA-23 (Aug. 19, 1955)

The specifications under a contract for the construction of a timber dam at a lump sum price required the contractor to make his own investigation of the site; warned the contractor that subsurface information shown on the plans was not guaranteed; and stipulated that hitches be cut to solid bedrock. Nevertheless, the contractor is entitled to recover on his claim for additional compensation for labor and materials in constructing the dam, when the excavation required to reach bedrock was greater than indicated in a table of test pit results included in the plans, and the dam itself, which was designed on the basis of this information, had to be considerably redesigned. As the contract also included the "changes" and the "changed conditions" articles of the standard form of Government construction contract, the specifications must be read in the light of these provisions, so that the contract will be construed as a whole, and effect given to all of its provisions. As a general proposition, however, it must not be assumed that test pit results which

are not guaranteed constitute in themselves a definite representation of fact on which a contractor may always rely as if they were warranties.

Appeal of Carson Construction Company, IBCA-12 (Aug. 19, 1955) 62 I. D. 311

Where a contractor who was excavating for footings for a high school in Ketchikan, Alaska, was required to visit the site, and acquaint himself with actual conditions of the work, and did visit the site which was covered with muskeg and hard rock exposed as the result of preliminary grading by another contractor, the contractor cannot be said to have encountered changed conditions even though continued rainfall subsequently softened the hardpan material underlying the site. The conditions encountered were to be expected in that region of Alaska, and the effects of blasting performed by the preliminary grading contractor should also have been known to the contractor, since it was performed prior to the bidding on the construction contract.

Appeals of Carson Construction Company, IBCA-21, IBCA-25, IBCA-28, IBCA-34 (Nov. 22, 1955) 62 I. D. 422

Where the contractor, who was engaged in the installation of a curtain in the Carter Barron Amphitheater in Rock Creek Park, Washington, D. C., accepted a change order which involved the operation of the boom and the curtain, so as to increase their operating speed, and the change order also provided for an extension of time of 100 days, delays occasioned by difficulties in procuring a special motor and adjusting electrical controls are not excusable, and the contractor is not entitled to an additional extension of time, which would permit the remission of liquidated damages, since the difficulties were clearly incident to the change, and so came within the scope of the change order. In the absence of any qualifications, acceptance by the contractor of a change order is legally binding, since it results in a new supplemental contract through modification of the original. The fact that the contracting officer might have granted a longer extension of time than the contractor accepted, and acted upon the assumption that a change order could not be issued unless it included a definite time extension, or stated that no change in time was involved, goes only to the motives of the contracting officer, and does not affect the binding character of the legal obligation. If any mistake of law was made, it was by the contracting

officer and was wholly unilateral. But even if there had been a mutual mistake of fact, the change order could not be reformed by the Board, since reformation of contracts is a judicial rather than administrative function.

Appeal of Samuel N. Zarpas, Inc., IBCA-24 (Jan. 4, 1956) 63 I. D. 1

A contractor who has encountered a quantity of rock in re-excavating a portion of a recently excavated canal is not entitled to additional compensation under article 4, the "changed conditions" article of the standard form of Government construction contract (No. 23) when the specifications and drawings provided for unclassified excavation and indicated the presence of rock, and the contractor had information or sources of information from which it could readily have ascertained the condition which was encountered. Conditions cannot be said to be "unknown" within the meaning of article 4 when they are foreseeable or ascertainable with the exercise of ordinary prudence, nor can conditions be said to be unusual within the meaning of the same article unless they turn out to be substantially worse than might reasonably be anticipated under the circumstances of the case.

Appeal of L. D. Shilling Company, Inc., IBCA-23 (Supp.) (Apr. 30, 1956) 63 I. D. 105

A contractor that encountered shale in working on sections of the Franklin Canal, a part of the Missouri River Basin Project, is not entitled to an equitable adjustment under the "changed conditions" article of its contract when the specifications called for unclassified excavation; the records of the subsurface investigations were not guaranteed; there were shale exposures in the vicinity; shale had been encountered under other contracts in the same vicinity; the generally known geological conditions in the neighborhood indicated the presence of shale; and the quantity of shale excavated amounted to only approximately 6 percent of the total structure excavation, and to less than two-tenths of 1 percent of the total excavation. The contractor could not insist that it would handle only such an amount or kind of shale as could be excavated with normal excavating equipment. As the specifications did not prescribe the type of equipment it was to employ, it was required to have such equipment as could take care of such hard material as might actually be encountered. It also could not rely on an alleged custom in the construction industry, requiring

the payment of ten times the dirt price when a hard material was encountered, since such a custom even if adequately established could not override the express provisions of the specifications.

Appeal of J. D. Armstrong Company, Inc., IBCA-40 (Aug. 17, 1956) 63 I. D. 289

Where a delay in the performance of the contract work is caused in part by excusable circumstances, such as the encountering of a "changed condition," and in part by inexcusable circumstances, such as a failure by the contractor to make adequate provision for overcoming known or expectable difficulties, an extension of time may be granted for so much of the total period of delay as fairly approximates the amount of time lost by reason of the excusable circumstances, even though the time so lost is not susceptible of precise determination because of the concurrent nature of the various causes of delay.

A contractor who, in the course of performing a standard form Government contract for the demolition of an existing building, encounters hidden structural conditions of which the contractor was unaware at the time of submitting its bid is entitled, under the "changed conditions" clause, to an extension of time on account of delays caused by such structural conditions, if their presence was not disclosed by any of the drawings furnished the contractor by the Government, would not have been revealed by an inspection of the scope which a prudent bidder could reasonably have been expected to make in advance of submitting its bid, and was not a feature usually found in a building of the type to be demolished.

Statements in the specifications of a standard form Government contract to the effect that Government-furnished information is not guaranteed, or that bidders are expected to inform themselves of all existing conditions, or that failure to estimate correctly the difficulties attending the execution of the work will not be a basis for relief, supplement the General Provisions of the contract, but do not supersede or override them, and do not preclude the allowance of extensions of time under the "changed conditions" clause in the event the contractor encounters conditions that fairly meet the standards prescribed by that clause.

Appeal of Central Wrecking Corporation, IBCA-69 (Mar. 29, 1957) 64 I. D. 145

Under a contract for the construction of Section "G" of the Richardson Highway in Alaska, the contractor is not entitled to additional compensation under the "changes" and "changed conditions" articles of the contract, notwithstanding the fact that the locations and yields of the borrow pits indicated on the plans did not reflect the yields of the borrow pits used in construction. Not only did the Government not guarantee the data indicated in the plans and reserve the right to establish substitute borrow pits when pits indicated on the drawings failed but the Government also under the terms of the special provisions of the contract modifying the "changes" and "changed conditions" articles reserved the right to make changes in the plans to meet unanticipated field conditions, and limited the right of the contractor to additional compensation to instances in which there were overruns or underruns in excess of 25 percent of estimated quantities. The contractor was, therefore, entitled to additional compensation only to the extent that borrow and overhaul exceeded the stated limitation.

Appeals of Morrison-Knudsen Company, Inc., IBCA-36 and IBCA-50 (May 27, 1957) 64 I. D. 185

A contractor who, in excavating a trench for a sewer in Charlotte Amalie, St. Thomas, Virgin Islands, in an area along the shoreline where a seawall and other waterfront improvements had been installed, encountered an unusually large number of submerged pier piles that were extremely difficult to remove, in addition to piles at a site indicated on a sheet of the drawings as the "Site of Old Pier Piles," is entitled to additional compensation either under the "changed conditions" or "changes" clause of the contract for the work involved in removing such piles. A general site investigation clause included in the specifications was too vague to constitute a sufficient warning of the existence of submerged piling at sites not indicated on the drawings, and the contractor may be said to have encountered a "changed condition" either because the existence of the submerged piling was a subsurface physical condition that differed materially from the representation made in the drawing, or because the number and character of the piles constituted an unknown physical condition of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. To the extent that the submerged piling actually removed was in excess of that indicated on the plans, there was also a "change" in the scope of the work.

CONTRACTS--Continued

CHANGED CONDITIONS--Continued

A contractor who, in excavating the trench for a sewer in Charlotte Amalie, St. Thomas, Virgin Islands, in an area of hydraulic fill installed in connection with the construction of a seawall, encountered in a large part of the area extremely unstable soil conditions that materially increased the costs of the excavation and made necessary a departure to a large extent from the methods of laying the sewer pipe prescribed in the specifications, is entitled to additional compensation under the "changed conditions" clause of the contract. The statement in the Invitation for Bids that the trench for the sewer was to be in "dredged fill" denoted, especially in connection with the surface appearance of the area, a classified fill rather than a spoil bank area. If the fill was a classified fill, the contractor had no reason to expect the difficulties it actually encountered. While the specifications did suggest the possibility of minor difficulties, they did not suggest the highly abnormal conditions actually encountered by the contractor. Since the sewer line could not be successfully laid by following entirely the methods prescribed in the specifications, and the Government acquiesced in the methods actually employed, the contractor is also entitled to additional compensation under the "changes" clause of the contract.

Appeal of Caribbean Construction Corporation, IBCA-90 (June 28, 1957) 64 I. D. 254

Under a contract for the alteration of a diversion dam and the enlargement of a canal, the claim of a contractor for compensation to cover the cost of providing added protection for the dam as a result of the closing by the Government of the headworks of the canal in order to control an earth slide which occurred at a time when the contractor, with the permission of the Government, was using the canal for diversion purposes, cannot be allowed under either the "changes" or "changed conditions" clause of the contract. By permitting the contractor to proceed with such water control plan the Government did not warrant that the canal would remain open even if repairs were required because of an accidental earth slide into the canal. A provision of the specifications that the contractor was to pass 800 cfs of water through the canal, after the end of the time allowed for its enlargement, did not create a duty on the part of the Government to allow the contractor, under all circumstances, to pass that amount of water through the canal.

Appeal of Paul Jarvis, Inc., IBCA-115 (July 19, 1957) 64 I. D. 285

CONTRACTS--Continued

CHANGED CONDITIONS--Continued

A contractor who was performing a contract to rehabilitate an existing irrigation system was obligated under the terms of the contract, which indicated that the work was to be delivered complete and undamaged, to repair the damage to such work caused by flood waters resulting from an unusually heavy rainstorm, even though it may not have been at fault in constructing the protective works required by the specifications. The costs of the repair work cannot be allowed under the "changed conditions" article of the contract.

Appeal of Barnard-Curtiss Company, IBCA-82 (Aug. 9, 1957) 64 I. D. 312

A claim for additional compensation on the ground that the orderly sequence of the contract work was disrupted, and the performance of the work ultimately brought to a complete stop, by reason of Government delay in furnishing material as required by the contract is not allowable under the present standard form "changed conditions" and "changes" clauses, or under a "suspension of work" clause which reserves to the Government, in general terms, the right to suspend the work and states that "this right to suspend the work shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension." A claim of this character is for damages for breach of contract, and is not within the authority of administrative officers of the Government to determine pursuant to the provisions of the standard form contracts, or such a "suspension of work" clause.

Appeal of Weardco Construction Corporation, IBCA-48 (Sept. 30, 1957) 64 I. D. 376

When the contractor has not met the burden imposed on it of establishing by substantial evidence the validity and amounts of its claims based on the "changed conditions" or "extras" provisions of the contract, an appeal from adverse decisions of the contracting officer must be denied. Specifically, the contractor has the burden of proving that the contracting officer was wrong in concluding that a proper site investigation would have enabled a reasonably prudent and experienced contractor to have anticipated the conditions encountered. Ordinarily, statements in claim letters are not sufficient proof of essential facts which are disputed.

Appeal of AAA Construction Company, IBCA-55 (Nov. 26, 1957) 64 I. D. 440

CHANGED CONDITIONS--Continued

In a case involving an approximate quantities provision, a variance between estimated and actual quantities, resulting from error in the estimate, does not in itself constitute a "changed condition," for the dimensions and descriptions set out in the drawings and specifications, rather than the figures given in the estimates, are the frame of reference for determining whether the physical conditions at the site differ from those indicated in the contract.

Appeal of the Diamond Engineering Company, IBCA-93 (Dec. 20, 1957)

A claim for additional compensation made by a tunneling contractor on the ground that it encountered "changed conditions" within the meaning of the first category of conditions specified in the U. S. standard form of Government construction contract, namely conditions materially different from those indicated by the drawings or specifications, cannot be allowed where the specifications provided that the geological conditions were not guaranteed, and that no additional allowance would be made for tunnel excavation on account of the nature or condition of any of the material encountered, and the drawings, although they contained in summary form logs of exploration, or drill hole information, were in themselves only representations of what was found in the particular drill holes rather than representations of what the contractor would encounter in actual excavation.

A claim for additional compensation made by a tunneling contractor on the ground that it encountered "changed conditions" within the meaning of the second category of conditions specified in the U. S. standard form of Government construction contract, namely conditions of such an unusual nature that they could not reasonably have been anticipated by the contractor, may be allowed notwithstanding the inclusion of caveatory, or exculpatory provisions in the specifications. Nevertheless, the burden of proving a claim in the second category is a fairly heavy one, since the contractor must show not only that it encountered conditions that were unexpected to it but also that the conditions encountered would have been generally regarded as unexpected by others engaged in the same type of operations. Therefore, such a claim must be rejected when the record shows that the contractor made only a hurried and casual prebid investigation; the specifications required the tunnels constructed to be fully supported; the drill hole information indicated the possibility of encountering adverse geological conditions; and the percentage of overbreak experienced by the contractor was only slightly more than should

CONTRACTS--Continued

CHANGED CONDITIONS--Continued

have been expected in view of the geological conditions, and the slight excess may have been attributable to the contractor's methods of operation.

Appeal of J. A. Terteling & Sons, Inc., IBCA-27 (Dec. 31, 1957) 64 I. D. 466

A contract in which the quantity of hauled excavation needed to construct the core of a dike across a marsh is estimated, and which includes an "approximate quantities" provision, together with a provision that settlement of the fill below the natural marsh line in varying amounts is expected, cannot be said to contain any definite representation concerning the amount of subsidence to be expected, and hence neither a "change" nor a "changed condition" can be said to have been established merely by showing that the estimated quantities of work had been substantially increased by the contracting officer by an order denominated a "change order."

Assuming for the sake of argument that such a negative form of misrepresentation as the entire withholding of available information by the Government may form the basis of a claim of a changed condition, a contractor engaged in constructing a dike in a marsh cannot be said to have established such a claim merely by showing that the Government had taken soundings in the marsh more than a decade and a half before the letting of the contract but failed to reveal the record of the soundings to bidders, in the absence of proof that the dike was constructed at the same location where the soundings had been taken and that the soundings would still have been useful.

That a condition encountered by a contractor who constructed a dike across a marsh was a "changed condition" within the meaning of the second category of such conditions, which comprises unanticipated conditions, cannot be established merely by showing that the contracting officer himself characterized the amount of subsidence of the core of the dike in the marsh as "excessive."

Appeal of Reid Contracting Company, Inc., IBCA-74 (Dec. 19, 1958) 65 I. D. 500

A claim for additional compensation made by a tunneling contractor, who expected that a tunnel would be drilled entirely through andesite rock but who found that, except for short distances near the portals, the tunnel had to be drilled through volcanic tuff breccia, may not be allowed under the "changed conditions" clause of the standard form of Government construction contract when the evidence shows that the tunnel

was drilled through a volcanic mountain area of rapidly changing formations, the geologic data set out in the contract drawings was insufficient to reflect the subsurface geology of the central reaches of the tunnel, the Government in the specifications explicitly and emphatically disclaimed knowledge of subsurface conditions in those reaches, and the surface geology was likewise insufficient to justify a conclusion that the tunnel would be driven through andesite rock for its entire length, and provision was also made in the specifications for contingencies that indicated that difficulties might be encountered in the excavation. In view of all these circumstances, the fact that the tunnel had to be more fully supported than the Government expected is not significant, especially since it appears that the amount of supports represented a compromise between the Government's engineers and the State safety inspectors in order to prevent the work from being shut down. Since the tuff breccia encountered by the contractor was not absolutely continuous; there were variations in the structure and other qualities of the material; and the record fails to show that the amount of tuff breccia exceeded the amount that could reasonably have been anticipated, there must also be rejected the contractor's contention that it could not reasonably have expected to encounter a continuous stretch of almost 3,000 feet of tuff or tuff breccia in variable volcanic material in a tunnel which was approximately 3,600 feet long.

A claim for additional compensation made by a tunneling contractor, who encountered volcanic tuff breccia rather than andesite rock which it expected, must be rejected, even if it be assumed that the tuff breccia material constituted a "changed condition" within the meaning of that clause in the standard form of Government construction contract, when the contractor is unable to prove that such material actually increased the difficulties of excavation and its costs. Such a conclusion must be reached when the record shows that normally tuff breccia is as easy to work in as andesite rock, and that the contractor's difficulties may have been largely due to its lack of experienced employees with the requisite know-how for dealing with the problems encountered and its employment of experimental methods and equipment which may have impeded the work.

Appeal of George A. Lord and William T. Lord, Partners, d/b/a Lord Bros. Contractors, IBCA-125 (Feb. 16, 1959) 66 I. D. 34

A request of a roadway contractor for reconsideration of a borrow claim, which is based on the contention that the Board could not give effect to deviations from the "changes" and "changed conditions" clauses of the U. S. standard form of construction contract that limited the applicability of these clauses because deviations were prohibited by the regulations relative to public contracts, must be denied. Such regulations are simply for the protection of the Government against its own officers, and hence

may not be enforced against the Government by a contractor seeking to avoid the obligation of its contract. Moreover, although the courts have declared the standard "changes" and "changed conditions" clauses to be paramount as against caveatory or exculpatory provisions in the specifications of a general nature, this is not equivalent to a prohibition upon deliberate deviations. The standard provisions are paramount as against inconsistent specifications only in cases in which there is no other aid to interpretation than the provisions of the standard form itself.

Appeal of Morrison-Knudsen Company, Inc., IBCA-36 and IBCA-50 (Mar. 23, 1959) 66 I. D. 71

A contractor who, in excavating for a septic tank and seepage pits, which were to be parts of a sewage disposal system for a school in a town in Alaska, encountered a water table that fluctuated seasonally, as well silt of a fluid consistency, although such conditions were contrary to indications in the plans, with the result that the Government engineers to avoid health hazards had to redesign the sewage disposal system entirely, may be said to have encountered unanticipated conditions which were "changed conditions" within the meaning of the applicable contract provision, notwithstanding that the specifications included also a general caveatory provision with respect to soil conditions. The acceptance by the contractor of the change orders, which provided for the redesign of the sewage disposal system, did not bar it from requesting an equitable adjustment of its increased costs prior to the redesign of the system.

Appeal of Waxberg Construction Company, IBCA-144 (Mar. 31, 1959) 66 I. D. 123

A claim for additional compensation by a contractor under the first category of the "changed conditions" clause of the contract, relating to divergent conditions, as distinguished from the second category of "changed conditions," relating to unanticipated conditions, on the ground that it encountered large quantities of hard material which, in view of the logs of subsurface exploration made available to it in the drawings, it could not reasonably have expected must be denied when the logs of exploration were outside the area to be excavated, and did not generally penetrate to grade, and in any event indicated that large quantities of hard material were present, and the presence of such hard material could have been ascertained by a more adequate site investigation. Whether or not logs of exploration can be regarded as unqualified representations must depend on the circumstances of each individual case. When a

CHANGED CONDITIONS--Continued

contract charges a contractor with the duty of investigating the site of the work, it must make such an investigation, whether or not it is asserting a changed condition in the first or the second category, unless indeed, the claim is based on a representation of such a nature that a site investigation would be completely pointless. However, the standard of adequacy in conducting a site investigation may well be less rigorous in first than in second category cases.

Appeal of Inter-City Sand and Gravel Co. and John Kovtynovich, IBCA-128 (May 29, 1959) 66 I. D. 179

Physical impediments to the performance of the contract work caused by the Government, or by another one of its contractors, do not constitute "changes" or "changed conditions" within the meaning of standard form construction contracts where such impediments do not alter in any way the quantum or characteristics of the work to be done as defined by the contract, are not contrary to anything contained in its provisions, and were not in existence when the contract was made or, if then in existence, were not conditions that were unusual as well as unknown to the contractor.

Appeal of Flora Construction Company, IBCA-101 (Sept. 4, 1959) 66 I. D. 315

A contractor who experienced large overruns in estimated schedule quantities in compacting embankments under a contract containing an "approximate quantities" provision is not entitled to additional compensation under the "changed conditions" clause of the contract merely because of such overruns, notwithstanding that a mathematical error was made by the Government in estimating the schedule quantities, nor because it had to perform the additional work of compacting the embankments during the dry summer months when the amount of moisture in the ground was less than in the winter or the spring. The contractor is also not entitled to an equitable adjustment under the "changes" clause, although errors in topography, resulting from the use by the Government of an inaccurate topographical map, increased the quantities of the compacted embankments, since the nature of the work to be done was in no wise altered. However, to the extent that the overrun in quantities of compacted embankment was attributable to the errors in topography, the contractor may be entitled to an equitable adjustment under the "changed conditions" clause, in that the true topography could be regarded as a "latent" physical condition at the site differing materially from the indicated topography.

Appeal of Osberg Construction Company, IBCA-139 (Oct. 16, 1959) 66 I. D. 354

CHANGES AND EXTRAS

Where, in the construction of a sewer, the original plans were discovered by the Project Engineer, who was the active supervisor of the work, to be erroneous, and he was allowed to revise the plans without any corrective action on the part of the contracting officer who was remote from the job, and as Chief Administrative Officer of the Bureau of Indian Affairs had other numerous and important duties to perform, and the Project Engineer thereafter made an error in laying out the sewer, the contractor is entitled to additional compensation for relaying part of the sewer in order to correct the error, and a proper change order should be entered.

Appeal of Art Pugsley, D/B/A Art Pugsley Construction Co., IBCA-5 (Feb. 25, 1955) 62 I. D. 54

A contract for aerial photography and topographic mapping of a reservoir and project lands provided for the mapping of all lands within a designated boundary up to a limiting contour, and for aerial photography only of the lands within the designated boundary north of a certain parallel of latitude. The parties, nevertheless, treated the designated boundary as only approximate, and the contractor was paid for mapping a considerable number of areas outside the designated boundary but within the limiting contour. In these circumstances, the contractor is entitled to additional compensation for aerial photography necessary to map an area on the northern edge of the project where the limiting contour ran considerably beyond the designated boundary. The fact that the additional work was not supported by a written change order does not bar the allowance of the claim since the disputed area was mapped with the knowledge and consent of representatives of the contracting officer, payment was made for the maps which were retained by the Government, and the mapping could not be required without also consenting to the photography.

Appeal of Ryall Engineering Company, IBCA-1 (Mar. 30, 1955) 62 I. D. 118

Revisions of the drawings for the construction of the earthwork and concrete foundations of an office building which do not involve changes or extras do not entitle the contractor to additional compensation by way of an equitable adjustment within the meaning of Article 3 of the standard form of Government construction contract.

CONTRACTS--Continued

CHANGES AND EXTRAS--Continued

Where, as a result of revision in plans, the Government reduced the amounts of excavation, compacting backfill, and dampproofing to be performed by the contractor, he is entitled by way of additional compensation not only to a percentage of his fixed costs attributable to the eliminated work but also to his anticipated profits. The "approximate quantities" clause included in the specifications excuses the Government from such liability only when the reductions in estimated quantities are not due to changes in plans.

Appeal of M. Hoard, IBCA-6 (May 11, 1955)

When extra work has been performed by a contractor, pursuant to an order of the contracting officer, a subsequent claim therefor by the contractor is not barred because no written order for extras was entered, as required by Article 5 of the standard form of Government construction contract, and the contracting officer may be directed to enter an appropriate change order. The purpose of Article 5 is to protect the Government against claims for extra compensation for work voluntarily undertaken by a contractor, or ordered by a subordinate of a contracting officer without his approval.

While the issuance by the Government of a stop order which is not justified by the terms of the contract between the Government and the contractor, and which is extraneous to the performance of the contract itself, is a breach of contract, and a claim arising therefrom is one for unliquidated damages, a stop order which constitutes a change in the contract or in the performance of work required by the specifications under the contract entitles a contractor to additional compensation as an equitable adjustment pursuant to the "changes" clause of the standard contract.

Appeal of Guthrie Electrical Construction, IBCA-22 (July 22, 1955) 62 I. D. 280

Where a change order for extra work is issued, to which the contractor has agreed, and the contractor has been paid the additional compensation provided in the change order, a claim for such compensation must be denied.

Appeal of Fischbach and Moore, IBCA-26 (July 25, 1955)

CONTRACTS--Continued

CHANGES AND EXTRAS--Continued

In case of a dispute as to allowances due the contractor under a change order, where the contracting officer requests the contractor to either accept the change order or take an appeal from his decision, which he has declared to be final, such conduct does not amount to duress. The contractor had been merely asked to choose between two perfectly legal alternatives.

Where the acceptance of a change order by the contractor represents a unilateral mistake on his part, administrative relief may not be had, since it is well-settled that the reformation of contracts is a judicial rather than an administrative function.

Where a contractor voluntarily accepts and signs a change order or similar form of contract modification, which expressly states that it is an adjustment of both of his claims arising from alleged changes, he cannot, in the absence of fraud or duress, successfully assert a claim for additional costs alleged to have resulted from the changes ordered.

Appeal of Sam Bergesen, IBCA-11 (Aug. 1, 1955) 62 I. D. 295

The claim of a contractor for an extension of time as a basis for the remission of liquidated damages must be denied when it is in excess of the period of delay attributable to changes in the work, and is based on the delay of the contracting officer in acting on the contractor's request for an equitable adjustment by reason of such changes. In a case of a dispute over changes, the contractor is required by articles 3 and 15 of the standard form of Government construction contract to prosecute the work with diligence, pending adjustment of the dispute.

Appeal of S. M. Johnson, d/b/a Johnson Construction and Maintenance Company, IBCA-13 (Aug. 18, 1955)

The specifications under a contract for the construction of a timber dam at a lump sum price required the contractor to make his own investigation of the site; warned the contractor that subsurface information shown on the plans was not guaranteed; and stipulated that hitches be cut to solid bedrock. Nevertheless, the contractor is entitled to recover on his claim for additional compensation for labor and materials in constructing the dam, when the excavation required to reach bedrock was greater than indicated in a table of test pit results included in the plans, and the dam itself, which was

CONTRACTS--Continued

CHANGES AND EXTRAS--Continued

designed on the basis of this information, had to be considerably redesigned. As the contract also included the "changes" and the "changed conditions" articles of the standard form of Government construction contract, the specifications must be read in the light of these provisions, so that the contract will be construed as a whole, and effect given to all of its provisions. As a general proposition, however, it must not be assumed that test pit results which are not guaranteed constitute in themselves a definite representation of fact on which a contractor may always rely as if they were warranties.

Appeal of Carson Construction Company, IBCA-12 (Aug. 19, 1955) 62 I. D. 311

Where the Government verbally directs the contractor to erect a building at an elevation one foot lower than that shown on the original drawings, making no mention of a change in the contract price, and more than two years later issues a change order not supported by adequate proof charging the contractor with $4,030 for saved backfill as the result of such lowering of the building, the Government cannot recover by way of counterclaim, the burden of proving a counterclaim being on the Government.

Appeal of Johnson Construction and Maintenance Company, IBCA-15 (Oct. 28, 1955)

Delay in the completion of pumps due to additional model tests voluntarily undertaken by contractor in order to discover cause of vibration in the pumps is not an excusable cause of delay entitling the contractor to the benefits of an escalation clause, even though technical problems of unusual difficulty may have been involved in the manufacture of the pumps, nor can adjustments made in the pumps be held to constitute changes which would entitle the contractor to extensions of time by way of an equitable adjustment under article 2 of the contract when the contractor voluntarily accepted the responsibility for making the changes.

Appeal of the Pelton Water Wheel Company and Byron Jackson Company, IBCA-16 (Oct. 12, 1955) 62 I. D. 385

The making of an equitable adjustment to provide additional compensation for extra work resulting from the issuance of a stop order does not necessarily entitle the contractor to payment upon the basis of unit prices in the

CONTRACTS--Continued

CHANGES AND EXTRAS--Continued

contract, although in some situations the unit prices in a contract may constitute a fair measure of the equitable adjustment to be made for the extra work ordered. The making of an equitable adjustment requires merely the ascertainment of the cost of the extra work and the addition to the cost of a reasonable and customary allowance for profit. Unit prices could not be applied in the present case, moreover, to determine the amount of the equitable adjustment, since the extra work was either part of a unit of the contract for which payment of a lump sum was provided, or part of work to be done at a unit price that included other work, as well as the supply of various materials.

Appeal of Guthrie Electrical Construction, IBCA-22 (Supp.) (Mar. 30, 1956)

Claims for additional compensation arising out of the construction of the Fort Clark Unit of the Missouri River Basin Project must be rejected, when the claims are either based on alleged extra work which was required by the specifications, or the claims are for unliquidated damages not cognizable by the Board, or the contractor failed to protest against the alleged extra work as required by the specifications.

Appeal of Korshoj Construction Co., Inc., IBCA-9 (May 2, 1956) 63 I. D. 129

The Board must reject the contractor's claim that it is entitled to additional compensation for cutting the merchantable timber on the special tracts themselves. The contractor performed this work without making any effort to obtain an extra work order in writing as required by the contract and specifications. The performance of the work without obtaining an extra work order made it voluntary, and it has long been settled that a contractor is not entitled to additional compensation for voluntary work. The fact that partial payments were made during the progress of the work is also without significance, since such payments were only provisional; nor did the performance of the work with knowledge of the Government inspectors improve the contractor's position. A contractor may have reasons of his own for undertaking work not required by the specifications, and the inspectors would not interfere with him unless the work affected the interests of the Government. If the presence of inspectors could validate work undertaken without a written extra work order, the requirement that such an order be obtained would be rendered nugatory, since Government inspectors are always present at the sites of the work. Furthermore, the contractor has failed to show convincingly that the so-called merchantable timber cut from the

special tracts was in fact merchantable. Since the definition of merchantability in the specifications was rather vague, the parties solved this problem practically by arranging to have the merchantable trees marked with yellow paint. The evidence does not warrant the conclusion, however, that the trees were so marked.

Although the contracting officer in this case, after the completion of the contract, granted an extension of time to the contractor exactly equal to the completion date of the contract, in order to compensate for the delays of the Government, such an extension of time seems more in the nature of a waiver of liquidated damages than a determination of the actual right of the contractor to an extension of time. While the mere delay of the contracting officer in granting an extension of time, or his mere failure to act on the contractor's request for such an extension, may not obligate the Government to make good the losses which may have been suffered by the contractor as a result, the case may be otherwise when the contracting officer has put pressure on the contractor to accelerate his operations. Such pressure may amount to a change in the requirements of the contract.

Appeal of Paul C. Helmick Co., IBCA-39
(July 31, 1956) 63 I. D. 209

A contractor who prior to the acceptance of its bid agreed to be bound by an expected redetermination of minimum wage rates by the Department of Labor is not entitled to additional compensation by reason of paying such wage rates, which were generally higher than the previous ones, when under the regulations of the Department of Labor governing wage determinations, such determinations did not become obsolete until more than 90 days had elapsed since the award of the contract to which the rates applied, and the contract was awarded within this period. Under the circumstances of the present case, the contract was awarded when the contracting officer finally notified the contractor that he had been awarded the contract rather than when the contract and bond forms were forwarded to the contractor for preliminary examination and execution.

A contractor is not entitled to additional compensation by reason of an overrun in compacted embankment work over the estimated amount of such work indicated in the schedule, notwithstanding that this estimate was erroneous, when the specifications included an approximate quantities provision; when the amount of compaction work actually required of the contractor conformed to the dimensions and standards prescribed by the drawings and specifications; and

CONTRACTS--Continued

CHANGES AND EXTRAS--Continued

when the contractor could have roughly computed this amount from the drawings before submitting its bid. A memorandum issued by one of the Government engineers to the contractor at its request in which the compacted and uncompacted embankment work remaining to be done was computed in tabular form in general conformity with the requirements of the specifications and drawings did not constitute a change within the meaning of the "changes" article of the contract, and hence did not entitle the contractor to additional compensation.

A contractor is not entitled to additional compensation for the construction of a berm when the record is so obscure that the contractor cannot be said to have established either that the work performed did not come under provisions of the specifications which would require the performance of the work at the bid prices, or that it actually sustained the additional costs claimed.

Appeal of J. D. Armstrong Company, Inc.,
IBCA-40 (Aug. 17, 1956) 63 I. D. 289

A contractor is not entitled to additional compensation for cleaning windblown material from constructed laterals when under the terms of the contract the contractor was required to deliver all work "complete and undamaged," and the contractor has not shown that the Government exceeded its normal rights as a landowner, or was otherwise at fault, in clearing adjoining farm units from which some of the windblown material may have derived. Moreover, even if the fault of the Government were to be presupposed, the restorative work would constitute neither a "change" nor an "extra," and could not, therefore, form a basis for the allowance of additional compensation under the contract.

Appeal of McWaters and Bartlett, IBCA-56
(Oct. 31, 1956)

A contractor who is directed to perform extra work after the completion date of the contract has passed is entitled to an extension of time equal to the number of days from the date the work was directed until the date when it is completed, provided the contractor has not delayed the extra work unnecessarily. The time consumed by the Government in determining the substance of the extra work to be directed is likewise excusable if the work is needed in order to correct a condition that was brought about by

an error of the Government and that obstructs the orderly performance of the original contract work.

Appeal of Urban Plumbing and Heating Company, IBCA-43 (Nov. 21, 1956) 63 I. D. 381

Extra work, made necessary by a change ordered by the contracting officer in the prescribed sequences or modes of operation, conceivably might be the basis of a valid claim for additional compensation which could administratively be allowed, notwithstanding the fact that the work was ordered for the purpose of avoiding or mitigating delays caused by failure of the Government to furnish equipment on time. The requisites for an administrative allowance of additional compensation, however, do not exist in a case where the sequences or modes of operation were not prescribed by the contract or an approved construction program; where the work performed for the purpose of avoiding or mitigating the Government-caused delays was work of a type provided for in the specifications; and where, in any event, there is no showing that the work was performed as an extra.

Appeal of A. S. Horner Construction Co., IBCA-75 (Dec. 20, 1956) 63 I. D. 401

Where the specifications contain an approximate quantities provision, a contractor is not entitled to additional compensation by reason of underruns in estimated quantities of crushed-rock blanket and riprap merely because the Government changed the design prior to the advertisement for bids but neglected to correct the estimates, if in fact the schedule quantities could have been verified by the contractor from the information supplied by the drawings and specifications. The mere fact that there was some degree of uncertainty in estimating the quantities from the drawings and specifications is immaterial if the degree of uncertainty was not appreciable.

Appeal of Texas Construction Company and Hyde Construction Company, IBCA-73 (Apr. 23, 1957) 64 I. D. 97

Under a contract for the construction of Section "G" of the Richardson Highway in Alaska, the contractor is not entitled to additional compensation under the "changes" and "changed conditions" articles of the contract, notwithstanding the fact that the locations and yields of the borrow pits indicated on the plans did not

reflect the yields of the borrow pits used in construction. Not only did the Government not guarantee the data indicated in the plans and reserve the right to establish substitute borrow pits when pits indicated on the drawings failed but the Government also under the terms of the special provisions of the contract modifying the "changes" and "changed conditions" articles reserved the right to make changes in the plans to meet unanticipated field conditions, and limited the right of the contractor to additional compensation to instances in which there were overruns or underruns in excess of 25 percent of estimated quantities. The contractor was, therefore, entitled to additional compensation only to the extent that borrow and overhaul exceeded the stated limitation.

The total deletion by the Government of an item providing for a select borrow surface course in a contract for the construction of Section "G" of the Richardson Highway in Alaska entitles the contractor to an equitable adjustment under the "changes" article of the contract when the item was deleted because of insufficiency of funds rather than to meet unanticipated field conditions, provided that the contractor has demonstrated a relation of cause and effect between the deletion of the item and the consequences attributed thereto. The contractor is entitled to an equitable adjustment for preparatory work on a specialized plant designed to produce the select borrow material economically but not for another plant which was either not acquired for the sole purpose of performing the deleted item or which was abandoned as the instrument for the performance of the item long before its deletion. On the other hand, the contractor is not entitled to any equitable adjustment by reason of difficulties encountered in finishing the subgrade when such difficulties were due to its own haste and inadequacies in finishing the subgrade prior to the deletion of the surfacing course, or by reason of the prolongation of the work into another operating season when this was due to the same cause, and to the failure of the contractor to give timely notice of completion prior to the onset of winter weather. A highway contractor may not maintain high-salaried employees and equipment during the winter to complete work that had been virtually completed at the close of the prior working season for fear that the Government might require excessive repairs of winter maintenance when such fear proved groundless. In any event, a claim that the failure of the Government to perform its obligations under a contract resulted in the prolongation of the work into another season is a claim for unliquidated damages that may not be administratively settled or allowed.

Appeals of Morrison-Knudsen Company, Inc., IBCA-36 and IBCA-50 (May 27, 1957) 64 I. D. 185

CONTRACTS--Continued

CHANGES AND EXTRAS--Continued

A contractor who, in excavating a trench for a sewer in Charlotte Amalie, St. Thomas, Virgin Islands, in an area along the shoreline where a seawall and other waterfront improvements had been installed, encountered an unusually large number of submerged pier piles that were extremely difficult to remove, in addition to piles at a site indicated on a sheet of the drawings as the "Site of Old Pier Piles," is entitled to additional compensation either under the "changed conditions" or "changes" clause of the contract for the work involved in removing such piles. A general site investigation clause included in the specifications was too vague to constitute a sufficient warning of the existence of submerged piling at sites not indicated on the drawings, and the contractor may be said to have encountered a "changed condition" either because the existence of the submerged piling was a subsurface physical condition that differed materially from the representation made in the drawing, or because the number and character of the piles constituted an unknown physical condition of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. To the extent that the submerged piling actually removed was in excess of that indicated on the plans, there was also a "change" in the scope of the work.

A contractor who, in excavating the trench for a sewer in Charlotte Amalie, St. Thomas, Virgin Islands, in an area of hydraulic fill installed in connection with the construction of a seawall, encountered in a large part of the area extremely unstable soil conditions that materially increased the costs of the excavation and made necessary a departure to a large extent from the methods of laying the sewer pipe prescribed in the specifications, is entitled to additional compensation under the "changed conditions" clause of the contract. The statement in the Invitation for Bids that the trench for the sewer was to be in "dredged fill" denoted, especially in connection with the surface appearance of the area, a classified fill rather than a spoil bank area. If the fill was a classified fill, the contractor had no reason to expect the difficulties it actually encountered. While the specifications did suggest the possibility of minor difficulties, they did not suggest the highly abnormal conditions actually encountered by the contractor. Since the sewer line could not be successfully laid by following entirely the methods prescribed in the specifications, and the Government acquiesced in the methods actually employed, the contractor is also entitled to additional compensation under the "changes" clause of the contract.

Appeal of Caribbean Construction Corporation, IBCA-90 (June 28, 1957) 64 I. D. 254

CONTRACTS--Continued

CHANGES AND EXTRAS--Continued

Under a contract for the alteration of a diversion dam and the enlargement of a canal, the claim of a contractor for compensation to cover the cost of providing added protection for the dam as a result of the closing by the Government of the headworks of the canal in order to control an earth slide which occurred at a time when the contractor, with the permission of the Government, was using the canal for diversion purposes, cannot be allowed under either the "changes" or "changed conditions" clause of the contract. By permitting the contractor to proceed with such water control plan the Government did not warrant that the canal would remain open even if repairs were required because of an accidental earth slide into the canal. A provision of the specifications that the contractor was to pass 800 cfs of water through the canal, after the end of the time allowed for its enlargement, did not create a duty on the part of the Government to allow the contractor, under all circumstances, to pass that amount of water through the canal.

Appeal of Paul Jarvis, Inc., IBCA-115 (July 19, 1957) 64 I. D. 285

A contractor who was performing a contract to rehabilitate an existing irrigation system was obligated under the terms of the contract, which indicated that the work was to be delivered complete and undamaged, to repair the damage to such work caused by flood waters resulting from an unusually heavy rainstorm, even though it may not have been at fault in constructing the protective works required by the specifications. The costs of the repair work cannot be allowed under the "changed conditions" article of the contract.

Appeal of Barnard-Curtiss Company, IBCA-82 (Aug. 9, 1957) 64 I. D. 312

Where the specifications were silent as to required thickness of steel tubing, and an oral instruction by a contracting officer was given 9 months after award of the contract specifying a thickness different from that which was adequate for the purpose, the action of the contracting officer constituted a change under article 3 of the contract for which an equitable adjustment should have been made.

Appeal of Minnis & Shilling, CA-225 (Supp.) (Aug. 30, 1957)

CONTRACTS--Continued

CHANGES AND EXTRAS--Continued

A claim for additional compensation on the ground that the orderly sequence of the contract work was disrupted, and the performance of the work ultimately brought to a complete stop, by reason of Government delay in furnishing material as required by the contract is not allowable under the present standard form "changed conditions" and "changes" clauses, or under a "suspension of work" clause which reserves to the Government, in general terms, the right to suspend the work and states that "this right to suspend the work shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension." A claim of this character is for damages for breach of contract, and is not within the authority of administrative officers of the Government to determine pursuant to the provisions of the standard form contracts, or such a "suspension of work" clause.

Appeal of Weardco Construction Corporation, IBCA-48 (Sept. 30, 1957) 64 I. D. 376

A claim of a clearing contractor for additional compensation because of a shortage of marketable materials, which it had a right to dispose of under the terms of the contract, may be allowed under the "changes" article of the standard form of Government construction contract when the shortage was due to conduct of the Government that reduced the quantum of the clearing work to be done by the contractor. The contractor, however, would not be entitled to additional compensation if such missing materials were not within the scope of the clearing work to be done under the contract, or were removed without the sanction of the Government after the passing of title to the contractor.

Appeal of Ideker Construction Company, IBCA-124 (Oct. 3, 1957) 64 I. D. 388

The equitable adjustment to which a contractor is entitled upon termination of a Government construction contract includes not only an allowance for profit but also for general overhead on the uncompleted portion of the work.

Appeal of D. R. Haddox, IBCA-84 (Supp.) (Oct. 18, 1957)

When the contractor has not met the burden imposed on it of establishing by substantial evidence the validity and amounts of its claims based on the "changed conditions" or "extras" provisions of the contract, an appeal from

CONTRACTS--Continued

CHANGES AND EXTRAS--Continued

adverse decisions of the contracting officer must be denied. Specifically, the contractor has the burden of proving that the contracting officer was wrong in concluding that a proper site investigation would have enabled a reasonably prudent and experienced contractor to have anticipated the conditions encountered. Ordinarily, statements in claim letters are not sufficient proof of essential facts which are disputed.

Appeal of AAA Construction Company, IBCA-55 (Nov. 26, 1957) 64 I. D. 440

A claim made by a tunneling contractor for remission of an overbreak charge because a certain yardage of the overexcavation was utilized in enlarging areas of the tunnels that intersected with a tunnel constructed under another contract must be rejected, since whatever change was involved was made under another contract, and did not in any way affect the quantity or characteristics of the work called for under the contract under which the claimant contractor operated, and the overbreak charge was made strictly in accordance with the terms of that contract.

Appeal of J. A. Terteling & Sons, Inc., IBCA-27 (Dec. 31, 1957) 64 I. D. 466

In putting in compacted backfill, in order to restore and complete a wasteway structure damaged by a storm, the contractor was performing "extra work" rather than "compacting backfill about structures" and hence was to be paid in accordance with the provisions of the specifications governing extra work, which were that the contractor be paid "the actual necessary cost" of such work, plus an allowance of 10 percent "for superintendence, general expense, and profit." In the absence of proof to the contrary, the Board must assume that the contracting officer took into consideration, in determining the unit price of the compacted backfill, the factor of a certain amount of hand tamping, in addition to repeated passage of the equipment, in compacting the backfill.

Appeal of Barnard-Curtiss Company, IBCA-82 (Supp.) (Jan. 23, 1958) 65 I. D. 49

A claim for additional compensation because of alleged tackiness, incorrect numbering, and poor legibility of aperture cards furnished by the Government to a supply contractor under a contract providing for the establishment of an

index of the public land records of the United States that contains "changes" and "extras" articles, but no "changed conditions" article, constitutes a claim for unliquidated damages for breach of contract or misrepresentation, rather than a claim based upon a change in or an addition to the contract, and, therefore, is beyond the jurisdiction of the Board of Contract Appeals to decide.

Appeal of York Tabulating Service, Inc., IBCA-126 (Mar. 7, 1958) 65 I. D. 120

After the occurrence of a storm, which damaged an excavation for anchors and footing for spillway 30-ton cableway, the contracting officer allowed the contractor an option in performing the necessary repair work between placing concrete to the limits of the excavation or forming to the neat line of the structure, in addition to requiring him to clean out the excavation. The contractor conceded his obligation to remove the materials that had sloughed into the excavation but contended that it could not be required to re-excavate beyond the neat lines or to place concrete fill in this area. Although the specifications required excavation to be made only to the neat lines of the structures, and it was contemplated that forming would be necessary only above ground levels, the repair of storm damage is not generally regarded as extra work, even though it is not contemplated by the specifications, and hence the contractor was not entitled to additional compensation unless it could show that the contracting officer, in allowing it a choice only between two alternatives prevented it from adopting still another method which was reasonably adapted to the requirements of the situation and which would have been less expensive than either of the two methods which were allowed. It is immaterial that the cost of repairing the storm damage was disproportionate, or that the work to be performed under the contract was limited to foundation work.

Appeal of Younger Bros., Inc., IBCA-148 (May 28, 1958) 65 I. D. 238

The claim of a contractor engaged in the construction of substations for the Bonneville Power Administration that he was obliged to incur expenses for overtime by reason of an order of the contracting officer to accelerate the work must be rejected when it appears that the contractor was greatly behind in his work at that time; that the contracting officer had the express right under the specifications to direct that the contractor's work force be increased when a satisfactory rate of progress was not being maintained; and that the contracting officer merely authorized the overtime work. Although

CONTRACTS--Continued

CHANGES AND EXTRAS--Continued

the contractor had prior thereto requested an extension of time, and the contracting officer had failed to act on the request, the contractor cannot be said to have been prejudiced when the request was not made at the time the delays occurred; the contractor did not demur against the contracting officer's inaction, and the contracting officer, after virtually granting the contractor's request at the time the work was ordered to be accelerated, finally granted an adequate extension of time.

Appeal of W & W Company, IBCA-54 (Aug. 4, 1958)

Despite the fact that a dike, which was constructed across a marsh by the contractor, was not constructed entirely in accordance with the method contemplated by the specifications, the contractor is not entitled to an equitable adjustment under the "changes" clause of the standard form of Government construction contracts, when the change in the method of construction was suggested by the contractor rather than by the contracting officer, and the contractor made the suggestion without requesting a change order, such work being voluntary work rather than a change in the technical sense. Moreover, if the method of construction adopted actually mitigated the difficulties of the contractor, arising from the continuous subsidence of the core of the dike in the marsh, any equitable adjustment would have to be made downwards rather than upwards. The contractor also could not claim that the sequence of operations contemplated by the specifications--placing fill, grading fill and placing topping material--was infeasible when it did not itself follow such sequence, and the officers of the Government did not attempt to interfere with the sequence of operations actually adopted by the contractor.

A contract in which the quantity of hauled excavation needed to construct the core of a dike across a marsh is estimated, and which includes an "approximate quantities" provision, together with a provision that settlement of the fill below the natural marsh line in varying amounts is expected, cannot be said to contain any definite representation concerning the amount of subsidence to be expected, and hence neither a "change" nor a "changed condition" can be said to have been established merely by showing that the estimated quantities of work had been substantially increased by the contracting officer by an order denominated a "change order."

Appeal of Reid Contracting Company, Inc., IBCA-74 (Dec. 19, 1958) 65 I. D. 500

CONTRACTS--Continued

CHANGES AND EXTRAS--Continued

A request of a roadway contractor for reconsideration of a borrow claim, which is based on the contention that the Board could not give effect to deviations from the "changes" and "changed conditions" clauses of the U. S. standard form of construction contract that limited the applicability of these clauses because deviations were prohibited by the regulations relative to public contracts, must be denied. Such regulations are simply for the protection of the Government against its own officers, and hence may not be enforced against the Government by a contractor seeking to avoid the obligation of its contract. Moreover, although the courts have declared the standard "changes" and "changed conditions" clauses to be paramount as against caveatory or exculpatory provisions in the specifications of a general nature, this is not equivalent to a prohibition upon deliberate deviations. The standard provisions are paramount as against inconsistent specifications only in cases in which there is no other aid to interpretation than the provisions of the standard form itself.

Appeals of Morrison-Knudsen Company, Inc., IBCA-36 and IBCA-50 (Mar. 23, 1959) 66 I. D. 71

Bridge construction contractors who in pouring concrete for the decks of two bridges constructed by them were required to do so in a particular sequence or manner, which necessitated the installation of construction joints not contemplated by the specifications, were directed to perform extra works, and hence are entitled to additional compensation and extensions of time for the performance of the work.

Bridge construction contractors, who were instructed to cut and recess a few metal stirrups used to hold the reinforcing steel in place while the concrete for the bridges was being poured, were not directed to perform extra work, since the work was so inconsequential that it did not materially affect the whole operation of getting the concrete true, even and free from projections, as required by the specifications.

When it is apparent from the whole record that in taking their appeal the contractors are not only requesting extensions of time but also additional compensation for extra work, and that the contracting officer intended to deny such additional compensation, the Board will direct the contracting officer to determine the amount of such additional compensation, notwithstanding the defects of the formal claims of the contractors.

Appeal of Cox and Haddox, IBCA-155 (Mar. 26, 1959) 66 I. D. 97

CONTRACTS--Continued

CHANGES AND EXTRAS--Continued

A contractor who, in excavating for a septic tank and seepage pits, which were to be parts of a sewage disposal system for a school in a town in Alaska, encountered a water table that fluctuated seasonally, as well silt of a fluid consistency, although such conditions were contrary to indications in the plans, with the result that the Government engineers to avoid health hazards had to redesign the sewage disposal system entirely, may be said to have encountered unanticipated conditions which were "changed conditions" within the meaning of the applicable contract provision, notwithstanding that the specifications included also a general caveatory provision with respect to soil conditions. The acceptance by the contractor of the change orders, which provided for the redesign of the sewage disposal system, did not bar it from requesting an equitable adjustment of its increased costs prior to the redesign of the system.

Appeal of Waxberg Construction Company, IBCA-144 (Mar. 31, 1959) 66 I. D. 123

Acceptance by a contractor of a change order which stipulated that "the time necessary for the completion of the work" described in the order is a certain number of days and that "the contract time is extended accordingly" does not bar the allowance of a further extension on account of time lost because of the inability of the contractor to perform portions of the original contract work until the Government had removed, through the issuance of the order, an excusable cause of delay.

Appeal of James C. Christopher, d/b/a Christopher Construction Company, IBCA-109 (Mar. 31, 1959) 66 I. D. 117

When a contract for the construction of a bridge and culverts in Rock Creek Park included both unit and lump sum items, an approximate quantities provision of the specifications, which in terms was made applicable only to unit items did not in itself bar additional compensation for overruns in the lump sum items.

Appeal of General Excavating Company, IBCA-150 (May 25, 1959)

When the Government in order to provide a maximum amount of water for irrigation purposes required the contractor to provide for storage of water in a reservoir above the maximum height designated in the contract, either by increasing the height of a temporary cofferdam previously constructed by the contractor or by increasing the height of the upstream edge of

the partially completed embankment of the permanent dam, such requirement went beyond the provision of the specifications imposing on the contractor the obligation to take certain protective and control measures to divert and care for the stream during construction and therefore constituted a change, entitling the contractor to an equitable adjustment. However, Government instructions to avert the threat of flood damage or to discharge other contractual obligations, apart from the change in storage requirements, did not constitute a change, entitling the contractor to an equitable adjustment.

When the provisions of the specifications of a contract require the contractor to store inflow into a reservoir to a certain elevation and to provide temporary control works which should be capable of releasing water up to 250 cubic feet per second in the event permanent outlet works are not completed by a certain date, such works must be capable of passing 250 cubic feet per second during the whole irrigation season and not merely when the works were first constructed and water was released through them, since the need for water during the irrigation season is a continuing one. However, the contractor is entitled to an equitable adjustment if its costs were increased by failure of the Government to require a larger opening in the intake structure at the time when it was being built.

Appeal of Inter-City Sand and Gravel Co. and John Kovtynovich, IBCA-128 (May 29, 1959) 66 I. D. 179

A railroad construction contractor who was to rehabilitate mileage of The Alaska Railroad and, in so doing, was required by the terms of the specifications to effect two separate track lifts totaling six inches with new crushed ballast from a pit located at Spencer, Alaska, did not satisfy the requirement for one of these lifts when in the course of replacing and respacing the ties it gave the track an initial or out-of-face lift, and tamped the old ballast to achieve a sound road bed for the replaced and respaced ties, even though when the track was lowered back to the road bed it may have been higher than before the commencement of the operations. As the out-of-face lift was either work that necessarily had to be performed to carry out the purposes of the contract, or was performed for the convenience of the contractor, it cannot qualify as extra work entitling the contractor to additional compensation. There was also nothing in the correspondence and negotiations relating to the approval by the contracting officer of the contractor's progress schedule which could be said to have effected a practical interpretation of the requirements of the specifications with respect to the track lifting operations inconsistent with their literal terms.

Under a contract for the rehabilitation of The Alaska Railroad which provides for an equitable adjustment in case of overruns of quantities of more than 25 percent, the contractor is nevertheless not entitled to an equitable adjustment in the unit price on account of such an overrun in the quantity of ballast loaded,

hauled, and placed when the evidence fails to show, at the very least, that the contractor's actual costs for loading, hauling, and placing the ballast, together with a reasonable allowance for profit thereon, exceeded the bid price. This cannot be said to have been established merely by testimony of the contractor's chief officer that the bid would have been higher if he had known that the railroad would not supply ballast loading equipment, where there was nothing in the specifications which required the railroad to supply such equipment.

Appeal of William A. Smith Contracting Company, Inc., IBCA-83 (Jun. 16, 1959) 66 I. D. 233

Physical impediments to the performance of the contract work caused by the Government, or by another one of its contractors, do not constitute "changes" or "changed conditions" within the meaning of standard form construction contracts where such impediments do not alter in any way the quantum or characteristics of the work to be done as defined by the contract, are not contrary to anything contained in its provisions, and were not in existence when the contract was made or, if then in existence, were not conditions that were unusual as well as unknown to the contractor.

Appeal of Flora Construction Company, IBCA-101 (Sept. 4, 1959) 66 I. D. 315

A contractor who experienced large overruns in estimated schedule quantities in compacting embankments under a contract containing an "approximate quantities" provision is not entitled to additional compensation under the "changed conditions" clause of the contract merely because of such overruns, notwithstanding that a mathematical error was made by the Government in estimating the schedule quantities, nor because it had to perform the additional work of compacting the embankments during the dry summer months when the amount of moisture in the ground was less than in the winter or the spring. The contractor is also not entitled to an equitable adjustment under the "changes" clause, although errors in topography, resulting from the use by the Government of an inaccurate topographical map, increased the quantities of the compacted embankments, since the nature of the work to be done was in no wise altered. However, to the extent that the overrun in quantities of compacted embankment was attributable to the errors in topography, the contractor may be entitled to an equitable adjustment under the "changed conditions" clause, in that the true topography could be regarded as a "latent" physical condition at the site differing materially from the indicated topography.

Appeal of Osberg Construction Company, IBCA-139 (Oct. 16, 1959) 66 I. D. 354

CONTRACTS--Continued

COMPTROLLER GENERAL

The question whether a recommendation should be made to the Comptroller General pursuant to section 10(a) of the act of September 5, 1950 (64 Stat. 578, 591), is referred to the Solicitor of the Department in whom the function of making such recommendations is vested by section 27 of Secretarial Order No. 2509, Amendment No. 16.

Appeal of Samuel N. Zarpas, Inc., 1BCA-24 (Jan. 4, 1956) 63 I. D. 1

The Board of Contract Appeals is not authorized to review a determination by the Comptroller General relative to the final settlement of a contract.

Appeal of Gila Construction Company, Inc., 1BCA-79 (Sept. 21, 1956) 63 I. D. 378

The Board of Contract Appeals is not authorized to review a final settlement made by the Comptroller General under his statutory authority.

Appeal of Economy Pumps, Inc., Division of C. H. Wheeler Manufacturing Company, 1BCA-94 (Feb. 13, 1957)

When a contracting officer withheld from payments due under a contract sums to cover contingent liabilities of a contractor by reason of alleged labor violations being investigated by him and by the Department of Labor, but made no findings of fact with respect to the alleged labor violations and merely informed the contractor that the matter was being referred to the Comptroller General, and when the contractor never requested the contracting officer to make findings of fact with respect to the alleged labor violations and did not complain of the withholding in its notice of appeal, but only in a subsequent brief, neither the issue of the alleged labor violations nor the propriety of the withholding is properly before the Board of Contract Appeals. The submission of the matter to the Comptroller General did not constitute a finding of fact or decision within the meaning of the "disputes" article of the contract, or of the regulations of the Board.

Appeal of Tri-State Construction Co., IBCA-63 (Feb. 26, 1957) 64 I. D. 38

CONTRACTS--Continued

COMPTROLLER GENERAL--Continued

The Board lacks jurisdiction to grant relief to a contractor under a Government supply contract in a case in which the contractor, upon being asked by the contracting officer to verify its bid, informed the latter that it had intended to make the bid but could no longer perform because of an increase in costs since the bid was made. The relief which the appellant contractor seeks seems to be either that the Board declare that no contract between the parties ever resulted or, if a contract was made by the parties, that the Board reform or rescind it. If there was no contract, the Board whose jurisdiction is contractual, could not act. If, on the other hand, a contract was made, relief could be granted only on the ground of a mistake in bid, and only the Comptroller General or the courts could afford such relief.

Appeal of Stainless Piping Supply, Inc., 1BCA-106 (May 6, 1957)

As the Comptroller General has held that the term "accompanying papers" in paragraph 5(b) of U. S. Standard Form 23A is not broad enough to include an Invitation for Bids, and the provision for liquidated damages in the present case, although mentioned in the Invitation for Bids, was not included in the contract itself, made on U. S. Standard Form 23, the Government may not assess liquidated damages against the contractor for failure to perform the contract within the stipulated time. The ruling of the Comptroller General is no less applicable because the contracting officer in transmitting the contract to the contractor also sent him a purchase order for the same work. Since the contractor had agreed only to execute the standard form of construction contract, the purchase order must be regarded as an extraneous and unilaterally issued document.

Appeal of Fred Saulsberry, 1BCA-65 (Sept. 13, 1957) 64 I. D. 357

The fact that an appellant, who was seeking, while its appeal was pending before the Board of Contract Appeals, the settlement on the administrative level of a dispute arising from the performance of its contract for the construction of a dike across a marsh did not specifically consent that the Administrative Assistant Secretary of the Department submit the questions of law involved in the dispute to the Comptroller General for his opinion does not make the pronouncements of the Comptroller General on these questions of law any the less binding on the Board, for the power of the Department to request the Comptroller General's opinion did not depend on the consent of the appellant, and the Board is bound by the

CONTRACTS--Continued

COMPTROLLER GENERAL--Continued

opinion of the Comptroller General on the questions of law duly determined by him. However, the opinion of the Comptroller General was rendered on an assumed state of facts, and the Board is not barred from deciding disputed questions, whether of fact or of law, that were not considered or determined by the Comptroller General.

Appeal of Reid Contracting Company, Inc., IBCA-74 (Dec. 19, 1958) 65 I. D. 500

CONTRACTING OFFICER

The burden of proof is on the contractor to establish claims for additional compensation and, in the absence of supporting data and evidence, the contracting officer's findings of fact must be accepted unless on the face of the record they appear to be erroneous.

Appeal of Lowdermilk Brothers, IBCA-10 (Feb. 11, 1955)

The appeal of a contractor from the decision of a contracting officer assessing liquidated damages against the contractor by reason of the late completion of the work cannot be considered on the merits when the contractor failed to give the contracting officer notice of the causes of the delay as required by Article 9 of the standard form of Government construction contract. The consideration of the causes of delay by the contracting officer on the merits does not amount to a waiver of the requirement of notice, since the contracting officer could extend the time for giving notice only with the approval of the head of the Department. Although the head of the Department had delegated to the heads of bureaus the authority to extend the time for giving notice, and had authorized them to redelegate the authority to their subordinates by order published in the Federal Register, no effective redelegation was accomplished in this case, since the Commissioner of Reclamation authorized his contracting officers to extend the time for giving notice by means of an unpublished instruction in the Bureau of Reclamation manual.

Appeal of S. J. Groves & Sons Company, IBCA-8 (April 12, 1955) 62 I. D. 145

CONTRACTS--Continued

CONTRACTING OFFICER--Continued

The findings of a contracting officer will be presumed to be correct in the absence of contrary proof by the contractor.

Appeal of A. G. McKinnon, d/b/a McKinnon Construction Co., IBCA-4 (April 25, 1955) 62 I. D. 164

Where a contracting officer has granted certain authority to a construction engineer for specific purposes, it does not follow that by such grant the contracting officer has divested himself of his general authority, nor that the construction engineer had authority to authorize changes.

Appeals of Carson Construction Company, IBCA-21, IBCA-25, IBCA-28, IBCA-34 (Nov. 22, 1955) 62 I. D. 422

Where under the terms of the contract and specifications, the District Engineer was permitted to decide "all questions of fact which may arise as to the interpretation of the plans and specifications" with a right of appeal to the head of the Department in case of dispute, the decision of the District Engineer that the contractor was not required to install the electrical tie-in must be regarded as final and binding, and may not be reversed by the contracting officer. As the contract in this case was administered largely by an absentee contracting officer, the provisions of the contract documents relating to the supervision of the work are to be liberally construed in favor of upholding the decision of the District Engineer. Although one of the specifications deprived the District Engineer of the authority to vary the terms of the contract documents, the interpretation of ambiguous provisions did not constitute such a variance. While the authority of the District Engineer to give final acceptance to the work was also limited, this did not limit his powers of interpreting ambiguous provisions of the contract documents while the work was in progress.

Appeal of the Fluor Corporation, Ltd., IBCA-53 (Jan. 23, 1956) 63 I. D. 24

Even if the location of a canal might have been materially different from that shown on the drawing, the Government would not be bound by any assurances orally given prior to the bidding by a subordinate of the contracting officer not authorized to give them. Moreover, even if so given, they would have no effect unless embodied also in the written contract, since it is well settled that the written contract merges all prior

negotiations and is presumed to express the final understanding of the parties. In so far as the claim may be based upon misrepresentation, it would not be cognizable by the Board.

Appeal of Korshoj Construction Co., Inc., IBCA-9 (May 2, 1956) 63 I. D. 129

As releases obtained by the Government by means of the exertion of economic duress have been treated as unilateral decisions of the contracting officer that are subject to appeal under the disputes clause of Government construction contracts, a release which should not have been accepted by the Government may similarly be treated as the unilateral act of the contractor and may be disregarded by the administrative reviewing authority on appeal. Although such an authority may not reform contractual instruments, the disregard of the release under such circumstances does not constitute an affirmative act of reformation.

Appeal of United Concrete Pipe Corporation, IBCA-42 (May 31, 1956) 63 I. D. 153

When specifications provide that a contracting officer may designate additional borrow areas not designated on the plans, the right must be exercised reasonably. The issue of reasonability may not be raised, however, by a contractor who has concurred in the opening of a borrow area.

Appeal of Osberg Construction Company, IBCA-32 (June 19, 1956) 63 I. D. 180

When in the course of clearing the right-of-way a forest fire occurred, the contractor was required under the applicable specifications to make every reasonable effort to suppress the fire, and hence is not entitled to additional compensation to cover its costs of suppressing the fire. It is immaterial that the fire may not have been caused by its operations, and that orders to suppress the fire were issued to the contractor by the contracting officer upon request of the United States Forest Service. If the fire was caused by the contractor's operations, it was liable, moreover, to pay to the Forest Service its costs of suppressing the fire, and damages for injury to National forest lands, and the contracting officer was justified in withholding from payments due to the contractor an amount sufficient to cover this contingent liability. Although the contracting officer has

CONTRACTS--Continued

CONTRACTING OFFICER--Continued

found that the fire was caused by the contractor's operations, and is liable to the Forest Service for its costs and damages, his finding is a mere conclusion wholly unsupported by evidentiary facts, and he is directed to revise his finding to remedy this defect.

When the specification governing the clearing of the special tracts and adjacent danger tree strips provided that the landowners would "remove any merchantable timber required to be cut by these specifications," the specification was ambiguous. When all the officers of the Government supervising the performance of the contract, including presumably the contracting officer, assumed that the landowners would both cut and remove the merchantable timber on these tracts and adjacent danger tree strips, and indeed negotiated with the contractor for a long time with respect to additional compensation for cutting the merchantable timber on the danger tree strips, the Board will adopt the practical construction put upon the contract by the parties, especially in view of the familiar rule that any ambiguity in a Government construction contract must be resolved against the Government. Consequently, the contractor is entitled to additional compensation for the extra work which was the subject of the negotiations.

Appeal of Paul C. Helmick Co., IBCA-39 (July 31, 1956) 63 I. D. 209

When the contracting officer has furnished to the Comptroller General, in response to the latter's request, information about a claim, which the contracting officer expected to be determined and settled by the Comptroller General, the furnishing of such information does not constitute a finding of fact or decision within the meaning of the disputes article of the present standard form of construction contract, or of the regulations of the Department of the Interior defining the authority of the Board.

Appeal of Gila Construction Company, Inc., IBCA-79 (Sept. 21, 1956) 63 I. D. 378

In construing an ambiguous provision of a contract weight may be given to the practical interpretation placed upon the provision by principal subordinates of the contracting officer who participated actively in its administration.

Appeal of Paul C. Helmick Company, IBCA-39 (Oct. 31, 1956) 63 I. D. 363

CONTRACTS--Continued

CONTRACTING OFFICER--Continued

When a specification requires that the contractor shall submit a construction program to the contracting officer but does not provide for its approval by him, it must be assumed that it was submitted merely for the information of the Government. Moreover, even if provision had been made for the approval of the construction program, such approval could not be given by the construction engineer unless authorized to do so by the contracting officer. Consequently, although the Government had undertaken to furnish certain equipment to the contractor, it was not obligated, merely because of the submission of the construction program, to furnish such equipment in such sequence as would enable the contractor to fulfill the construction program without incurring the assessment of liquidated damages.

Appeal of A. S. Horner Construction Co., IBCA-75 (Dec. 20, 1956) 63 I. D. 401

Where a contract provided for an extension of time in case solid rock should be encountered by the contractor in the drilling of a well but also required immediate notice to be given to the contracting officer of the existence of any such condition, the failure of the contractor to comply with this procedural requirement bars consideration on the merits of a request for an extension of time. Even assuming that the procedural requirement could have been waived by the contracting officer, his mere silence cannot be construed as a waiver in the circumstances of this case.

Appeal of Carl W. Pistor, IBCA-81 (Dec. 27, 1956)

During the period of 30 days allowed for the taking of an appeal from a contracting officer's decision, made pursuant to the "disputes" clause of the standard form Government contracts, the contracting officer may withdraw or change his decision; and, if he does so before an appeal has been taken, the running of the original period of 30 days is tolled, and a new period commences to run at such time as the contractor receives a copy of an amendatory or substitute decision. A communication from a contracting officer to a contractor, in order to amount to a decision that will start running the period for appeal, must, at least, be so worded as fairly and reasonably to inform the contractor that a determination under the "disputes" clause is intended.

Appeal of Central Wrecking Corporation, IBCA-69 (Mar. 29, 1957) 64 I. D. 145

CONTRACTS--Continued

CONTRACTING OFFICER--Continued

The Board lacks jursidiction to grant relief to a contractor under a Government supply contract in a case in which the contractor, upon being asked by the contracting officer to verify its bid, informed the latter that it had intended to make the bid but could no longer perform because of an increase in costs since the bid was made. The relief which the appellant contractor seeks seems to be either that the Board declare that no contract between the parties ever resulted or, if a contract was made by the parties, that the Board reform or rescind it. If there was no contract, the Board whose jurisdiction is contractual, could not act. If, on the other hand, a contract was made, relief could be granted only on the ground of a mistake in bid, and only the Comptroller General or the courts could afford such relief.

Appeal of Stainless Piping Supply, Inc., IBCA-106 (May 6, 1957)

When the contracting officer has considered claims on their merits, they are not barred by the failure of the contractor to comply with the procedural requirement of written notice of the claims, and the circumstance that the claims may have been considered by the contracting officer on the merits only as a matter of grace, may not be given any weight by the Board of Contract Appeals in assessing the merits of the claims on appeal.

Appeal of Caribbean Construction Corporation, IBCA-90 (June 28, 1957) 64 I. D. 254

Under the "disputes" clause of the standard-form Government construction contracts, the contracting officer has the responsibility of apprising the contractor of the basis for his decision, and under the "delays-damages" clause, he has the further responsibility of making findings of fact with respect to the circumstances and extent of alleged excusable causes of delay.

Appeal of Chas. I. Cunningham Co., IBCA-60 (Dec. 6, 1957) 64 I. D. 449

A claim for additional compensation made by a tunneling contractor on the ground that the omission of certain drill hole information from the drawings was a material misrepresentation is a claim for unliquidated damages which could not be considered by the contracting officer, and may not be considered by the Board on appeal.

Appeal of J. A. Terteling & Sons, Inc., IBCA-27 (Dec. 31, 1957) 64 I. D. 466

CONTRACTING OFFICER--Continued

After the occurrence of a storm, which damaged an excavation for anchors and footing for spillway 30-ton cableway, the contracting officer allowed the contractor an option in performing the necessary repair work between placing concrete to the limits of the excavation or forming to the neat line of the structure, in addition to requiring him to clean out the excavation. The contractor conceded his obligation to remove the materials that had sloughed into the excavation but contended that it could not be required to re-excavate beyond the neat lines or to place concrete fill in this area. Although the specifications required excavation to be made only to the neat lines of the structures, and it was contemplated that forming would be necessary only above ground levels, the repair of storm damage is not generally regarded as extra work, even though it is not contemplated by the specifications, and hence the contractor was not entitled to additional compensation unless it could show that the contracting officer, in allowing it a choice only between two alternatives prevented it from adopting still another method which was reasonably adapted to the requirements of the situation and which would have been less expensive than either of the two methods which were allowed. It is immaterial that the cost of repairing the storm damage was disproportionate, or that the work to be performed under the contract was limited to foundation work.

Appeal of Younger Bros., Inc., IBCA-148 (May 28, 1958) 65 I. D. 238

When a contractor who was seeking an extension of time for the performance of a contract claimed that the cause of delay in completion was attributable to the conduct of an inspector who had died before the completion of the contract and that he had been dissuaded from notifying the contracting officer of the cause of the delay by the assurance of the inspector that he would be granted an extension of time, the Board will not disturb the decision of the contracting officer that an extension of time should be denied because of the failure of the contractor to give written notice of the cause of the delay in the absence of proof that the merits of the claim could still be ascertained and that the inspector gave the assurance claimed.

Appeal of Utility Construction Company, IBCA-149 and IBCA-161 (June 19, 1958) 65 I. D. 278

The claim of a contractor engaged in the construction of substations for the Bonneville Power Administration that he was obliged to incur expenses for overtime by reason of an order of the contracting officer to accelerate

CONTRACTING OFFICER--Continued

the work must be rejected when it appears that the contractor was greatly behind in his work at that time; that the contracting officer had the express right under the specifications to direct that the contractor's work force be increased when a satisfactory rate of progress was not being maintained; and that the contracting officer merely authorized the overtime work. Although the contractor had prior thereto requested an extension of time, and the contracting officer had failed to act on the request, the contractor cannot be said to have been prejudiced when the request was not made at the time the delays occurred; the contractor did not demur against the contracting officer's inaction, and the contracting officer, after virtually granting the contractor's request at the time the work was ordered to be accelerated, finally granted an adequate extension of time.

A contractor engaged in the construction of a substation for the Bonneville Power Administration cannot successfully assert a claim for damages based on the failure of the contracting officer to approve a source of quarry rock within the period specified in the contract when his request for approval did not clearly designate the source of the rock, and he had no firm commitment for the crushing of the rock during the period of delay.

Appeal of W & W Company, IBCA-54 (Aug. 4, 1958)

Appeals from decisions of contracting officers which involve a question of law are not subject to the 30-day limit prescribed in the "disputes" clause of the standard Government construction contract, since that clause relates only to disputes "concerning a question of fact."

Appeal of Gustav Hirsch Organization, Inc., IBCA-175 (Oct. 30, 1958)

Under a contract which empowers the contracting officer to suspend the work when the weather is unsuitable, or conditions are unfavorable for its suitable prosecution, the action of the contracting officer in fixing the date on which a suspension is to begin or end does not preclude the retroactive allowance of extensions of time for a period immediately preceding or following the date so fixed, if during such period no real progress on the contract work was achieved by reason of weather conditions that clearly were unsuitable or unfavorable.

Appeal of Larsen-Meyer Construction Co., IBCA-85 (Nov. 24, 1958) 65 I. D. 463

CONTRACTS--Continued

CONTRACTING OFFICER--Continued

A contracting officer is entitled to have contractors give him reasonable notice of readiness of the work for final inspection.

Appeal of Cox and Haddox, IBCA-155 (Mar. 26, 1959) 66 I. D. 97

The Board of Contract Appeals will not determine an appeal by a contractor in the absence of findings of fact and a decision by the contracting officer.

Appeal of General Excavating Company, IBCA-150 (May 25, 1959)

CONTRACTOR

When in the course of clearing the right-of-way a forest fire occurred, the contractor was required under the applicable specifications to make every reasonable effort to suppress the fire, and hence is not entitled to additional compensation to cover its costs of suppressing the fire. It is immaterial that the fire may not have been caused by its operations, and that orders to suppress the fire were issued to the contractor by the contracting officer upon request of the United States Forest Service. If the fire was caused by the contractor's operations, it was liable, moreover, to pay to the Forest Service its costs of suppressing the fire, and damages for injury to National forest lands, and the contracting officer was justified in withholding from payments due to the contractor an amount sufficient to cover this contingent liability. Although the contracting officer has found that the fire was caused by the contractor's operations, and is liable to the Forest Service for its costs and damages, his finding is a mere conclusion wholly unsupported by evidentiary facts, and he is directed to revise his finding to remedy this defect.

The Government was, however, liable for damages for its delay in making available to the contractor a number of danger tree strips adjacent to certain special tracts from which the owners of the tracts rather than the contractor were to remove the merchantable timber. Although these danger tree strips were not made available to the contractor until shortly before the final date for completion of the contract, the Government has failed to offer any reasonable explanation for the delay. In this case, the delay must be regarded as especially serious, since it was implicit in the requirements of the contract that the clearing of the special tracts and the felling of the adjacent danger trees would be a related operation.

Appeal of Paul C. Helmick Co., IBCA-39 (July 31, 1956) 63 I. D. 209

CONTRACTS--Continued

CONTRACTOR--Continued

When a specification requires that the contractor shall submit a construction program to the contracting officer but does not provide for its approval by him, it must be assumed that it was submitted merely for the information of the Government. Moreover, even if provision had been made for the approval of the construction program, such approval could not be given by the construction engineer unless authorized to do so by the contracting officer. Consequently, although the Government had undertaken to furnish certain equipment to the contractor, it was not obligated, merely because of the submission of the construction program, to furnish such equipment in such sequence as would enable the contractor to fulfill the construction program without incurring the assessment of liquidated damages.

Appeal of A. S. Horner Construction Co., IBCA-75 (Dec. 20, 1956) 63 I. D. 401

DAMAGES

Generally

Where, as a result of revision in plans, the Government reduced the amounts of excavation, compacting backfill, and dampproofing to be performed by the contractor, he is entitled by way of additional compensation not only to a percentage of his fixed costs attributable to the eliminated work but also to his anticipated profits. The "approximate quantities" clause included in the specifications excuses the Government from such liability only when the reductions in estimated quantities are not due to changes in plans.

Appeal of M. Hoard, IBCA-6 (May 11, 1955)

The contractor was proceeding legally at its own risk in moving men and equipment to tracts of the right-of-way prior to the receipt of formal written notice that the tracts were available, and hence the Government was not liable for any damages which the contractor may have sustained as a result of its premature occupation of the tracts.

Appeal of Paul C. Helmick Co., IBCA-39 (July 31, 1956) 63 I. D. 209

CONTRACTS--Continued

DAMAGES--Continued

Generally--Continued

A contractor is not entitled to additional compensation for the construction of a berm when the record is so obscure that the contractor cannot be said to have established either that the work performed did not come under provisions of the specifications which would require the performance of the work at the bid prices, or that it actually sustained the additional costs claimed.

Appeal of J. D. Armstrong Company, Inc., IBCA-40 (Aug. 17, 1956) 63 I. D. 289

A claim for additional compensation on account of an increase in wages granted by the contractor, in response to a union demand, must be denied where the only contractual provision under which the claim might conceivably be allowed is limited to expenses that are "actual, reasonable, and necessary," and where there is no showing that the labor market in the contract area was such that the contractor had no alternative but to meet the demand.

Appeal of Commonwealth Electric Company, IBCA-87 (Jan. 18, 1957)

A contractor engaged in the construction of a substation for the Bonneville Power Administration cannot successfully assert a claim for damages based on the failure of the contracting officer to approve a source of quarry rock within the period specified in the contract when his request for approval did not clearly designate the source of the rock, and he had no firm commitment for the crushing of the rock during the period of delay.

The damage claims of a contractor engaged in the construction of substations for the Bonneville Power Administration based on alleged orders of inspectors to perform work in excess of, or contrary to the requirements of the specifications, must be rejected when the claims are not supported by credible evidence and the contractor did not protest to the inspectors' superiors at the time such work was performed, and request them to determine whether the orders of the inspectors were arbitrary and unreasonable.

Appeal of W & W Company, IBCA-54 (Aug. 4, 1958)

CONTRACTS--Continued

DAMAGES--Continued

Generally--Continued

Under a contract for the clearing of a transmission line right-of-way within a national forest which provides that the contractor shall pay "suppression costs and damages resulting from any fires caused by his operations," a claim by the Government for payment of such costs and damages is allowable when the fact that the fire was caused by the contractor's operations is established by a preponderance of the evidence. Evidence showing that the fire started at a place where smoking would have been particularly dangerous and would probably have resulted in the immediate discharge of an employee detected in so doing, that a group of the contractor's employees ate lunch extremely close to this place within approximately 30 minutes before the discovery of the fire, that one of these employees was an habitual smoker, that following the lunch period this employee had a clear opportunity for undetected smoking at the place where the fire started, that the possibility of the fire having been started by occurrences other than smoking was remote, that the possibility of persons other than the contractor's employees having been sufficiently close in point of time and distance to have started the fire was likewise remote, and that the employee who was an habitual smoker had not denied that he did smoke during or after the lunch period, but, in statements made shortly after the fire, had asserted that, while he was aware of the hazards of smoking in the woods and took precautions against fire whenever he did so, he could not remember whether he had smoked on this occasion, is sufficient to establish that the fire was caused by carelessness on the part of one of the contractor's employees.

Appeal of Paul C. Helmick Company, IBCA-39 (Supp.) (Aug. 21, 1958) 65 I. D. 355

Interest is not allowable as a part of an equitable adjustment under a standard form Government contract.

Appeal of Flora Construction Company, IBCA-101 (Sept. 4, 1959) 66 I. D. 315

Liquidated Damages

The partial use of the facility constructed by the contractor is not a sufficient reason for remitting liquidated damages, when such use in no way interfered with the work of the contractor.

Appeal of Campbell Construction & Equipment Co., IBCA-2 (Jan. 11, 1955) 62 I. D. 6

CONTRACTS--Continued

DAMAGES--Continued

Liquidated Damages--Continued

Where a contract was modified by an understanding between the parties which was, strictly speaking, inconsistent with its literal terms, and so constituted a change "within the general scope" thereof, as provided in article 2 thereof, and where as a result of the change the contractor was required to perform extra work, he is entitled not only to payment for the extra work accomplished but also to an extension of time for the completion of the work by way of an equitable adjustment, and liquidated damages which have been assessed against him should be remitted.

Appeal of Ryall Engineering Company, IBCA-1
(Mar. 30, 1955) 62 I. D. 118

The Interior Board of Contract Appeals is not authorized to make recommendations to the Comptroller General with respect to the remission of liquidated damages pursuant to section 10(a) of the act of September 5, 1950 (64 Stat. 578, 591, 41 U.S.C., 1952 ed., sec. 256a). This function is vested in the Solicitor of the Department by section 27 of Order No. 2509, Amendment No. 16.

It is well settled that the failure to except an item from settlement has the effect of barring any claim based on such item, and, therefore, a contractor who, in executing a release on the contract, requested an extension of time of a certain number of days for the completion of the work under the contract, cannot subsequently increase its request to a greater number of days, in order to avoid the assessment of liquidated damages.

Appeal of S. J. Groves & Sons Company, IBCA-8
(April 12, 1955) 62 I. D. 145

The claim of a contractor for an extension of time as a basis for the remission of liquidated damages must be denied when it is in excess of the period of delay attributable to changes in the work, and is based on the delay of the contracting officer in acting on the contractor's request for an equitable adjustment by reason of such changes. In a case of a dispute over changes, the contractor is required by articles 3 and 15 of the standard form of Government construction contract to prosecute the work with diligence, pending adjustment of the dispute.

Appeal of S. M. Johnson, d/b/a Johnson Construction and Maintenance Company, IBCA-13
(Aug. 18, 1955)

CONTRACTS--Continued

DAMAGES--Continued

Liquidated Damages--Continued

The question whether a recommendation should be made to the Comptroller General pursuant to section 10(a) of the act of September 5, 1950 (64 Stat. 578, 591), is referred to the Solicitor of the Department in whom the function of making such recommendations is vested by section 27 of Secretarial Order No. 2509, Amendment No. 16.

Where the contractor, who was engaged in the installation of a curtain in the Carter Barron Amphitheater in Rock Creek Park, Washington, D. C., accepted a change order which involved the operation of the boom and the curtain, so as to increase their operating speed, and the change order also provided for an extension of time of 100 days, delays occasioned by difficulties in procuring a special motor and adjusting electrical controls are not excusable, and the contractor is not entitled to an additional extension of time, which would permit the remission of liquidated damages, since the difficulties were clearly incident to the change, and so came within the scope of the change order. In the absence of any qualifications, acceptance by the contractor of a change order is legally binding, since it results in a new supplemental contract through modification of the original. The fact that the contracting officer might have granted a longer extension of time than the contractor accepted, and acted upon the assumption that a change order could not be issued unless it included a definite time extension, or stated that no change in time was involved, goes only to the motives of the contracting officer, and does not affect the binding character of the legal obligation. If any mistake of law was made, it was by the contracting officer and was wholly unilateral. But even if there had been a mutual mistake of fact, the change order could not be reformed by the Board, since reformation of contracts is a judicial rather than administrative function.

Appeal of Samuel N. Zarpas, Inc., IBCA-24
(Jan. 4, 1956) 63 I. D. 1

Although the contracting officer in this case, after the completion of the contract, granted an extension of time to the contractor exactly equal to the completion date of the contract, in order to compensate for the delays of the Government, such an extension of time seems more in the nature of a waiver of liquidated damages than a determination of the actual right of the contractor to an extension of time. While the mere delay of the contracting officer in granting an extension of time, or his mere failure to act on the contractor's request for such an extension, may not obligate the Government to make good the losses

CONTRACTS--Continued

DAMAGES--Continued

Liquidated Damages--Continued

which may have been suffered by the contractor as a result, the case may be otherwise when the contracting officer has put pressure on the contractor to accelerate his operations. Such pressure may amount to a change in the requirements of the contract.

Appeal of Paul C. Helmick Co., IBCA-39 (July 31, 1956) 63 I. D. 209

The test for determining whether the work under a Government contract has been completed, within the intent of provisions imposing liquidated damages for failure to complete the work by a prescribed date, is not whether every jot and tittle of the work has been done, but whether the contractor has substantially performed the work required by the contract. Evidence that the job of building a particular structure has been substantially completed may be found in the relative inconsequentiality, both as to character and amount, of the work remaining to be done; in the successful use of the structure for its intended purpose, notwithstanding some uncorrected defects; and in the expert opinions of the chiefs of the engineering and administrative services of the bureau that made the contract and supervised its administration to the effect that the contract work had been substantially completed.

Appeal of Urban Plumbing and Heating Company, IBCA-43 (Nov. 21, 1956) 63 I. D. 381

A contract for the erection of several comfort stations may be considered as substantially complete, within the meaning of the rule of law that precludes the assessment of liquidated damages for periods after the contract work is substantially complete, notwithstanding that at one of the comfort stations minor items of corrective work remain to be done and a few of the toilet fixtures remain to be installed, if the evidence establishes that these deficiencies are not such as to impair materially the useability of the station.

Appeal of Elmer A. Roman, IBCA-57 (June 28, 1957)

Delay by a supplier because of a nation-wide steel strike which disrupted work prior to the actual walkout and subsequent to the end of the strike and delayed the production of steel by the supplier for a considerable period of time, rendered excusable a delay by a construction contractor, who relied upon the supplier; and

CONTRACTS--Continued

DAMAGES--Continued

Liquidated Damages--Continued

liquidated damages for the delay withheld from final payment should be released and paid to the contractor.

Appeal of Minnis & Shilling, CA-225 (Supp.) (Aug. 30, 1957)

When there has been a failure to make provision in a contract for the assessment of liquidated damages, such damages may not be assessed against the contractor notwithstanding his failure to urge this as a ground for reversal. Such failure is not an example of "practical construction" of the contract by the parties, which has to do with interpretation of its terms during the period of performance.

As the Comptroller General has held that the term "accompanying papers" in paragraph 5(b) of U. S. Standard Form 23A is not broad enough to include an Invitation for Bids, and the provision for liquidated damages in the present case, although mentioned in the Invitation for Bids, was not included in the contract itself, made on U. S. Standard Form 23, the Government may not assess liquidated damages against the contractor for failure to perform the contract within the stipulated time. The ruling of the Comptroller General is no less applicable because the contracting officer in transmitting the contract to the contractor also sent him a purchase order for the same work. Since the contractor had agreed only to execute the standard form of construction contract, the purchase order must be regarded as an extraneous and unilaterally issued document.

Appeal of Fred Saulsberry, IBCA-65 (Sept. 13, 1957) 64 I. D. 357

When from the reported circumstances in documents in the appeal file, it may be inferred that two hurricanes, each of which lasted approximately 1 day, caused difficulties that delayed the work by approximately 2 days in the aggregate, such delay was excusable and the contractor is entitled to an extension of the time for performance of 2 days.

Appeal of AAA Construction Company, IBCA-55 (Nov. 26, 1957) 64 I. D. 440

Failure by a contractor to prosecute the contract work with the efficiency and expedition required for its completion within the contract time does not, in and of itself, disentitle the

CONTRACTS--Continued

DAMAGES--Continued

Liquidated Damages--Continued

contractor to extensions of time for such parts of the ultimate delay in completion as are attributable to events, such as acts of the Government or strikes, that are excusable under the terms of the contract.

Appeal of Chas. I. Cunningham Co., IBCA-60
(Dec. 6, 1957) 64 I. D. 449

A tunneling contractor seeking an additional extension of time to cancel an assessment of liquidated damages on the ground that it had to remove the tunnel inverts in winter weather by reason of delays of the Government in procuring steel must be denied relief when it appears that the Government's delay actually gave the contractor a more favorable period of performance than it would have had if the delay had never occurred, and the contractor has not shown that it encountered during the period of performance "unusually severe weather" or other excusable causes of delay within the meaning of the "delays-damages" provision of the U. S. standard form of Government construction contract. On the contrary, the record shows that the causes of delay, far from being excusable, were the fault of the contractor.

Appeal of J. A. Terteling & Sons, Inc., IBCA-27
(Dec. 31, 1957) 64 I. D. 466

A contract for the delivery of pumping equipment for irrigation purposes which expressly states that liquidated damages will be assessed for each day of delay beyond the time for shipment specified in the contract, and which contains other expressions indicative of an intent to impose liquidated damages for any delay beyond the specified shipment date, but which describes the contemplated possible losses as being crop and other losses resulting from "a delay in the installation of the equipment," is to be interpreted as imposing liquidated damages for each day by which shipment is later than the specified shipment date, even though the equipment is received before it is actually needed for installation.

A provision imposing liquidated damages for delay in shipment, contained in a contract for the delivery of pumping equipment to be used for irrigation purposes, is not rendered unenforceable as a penalty merely because the Government after the making of the contract defers the construction of the pumping station in which the equipment is to be installed, or merely because the Government informs the contractor of this deferment prior to the shipment date specified in the contract, or merely because favorable rainfall conditions avert the

CONTRACTS--Continued

DAMAGES--Continued

Liquidated Damages--Continued

crop losses contemplated when the contract was made, so that no harm results from the delay in shipment.

Appeal of Fairbanks, Morse & Co., IBCA-146
(Aug. 11, 1958) 65 I. D. 321

Where a supply contractor under a contract for the furnishing of motor-driven pumping units failed to submit for Government approval within the time prescribed by the contract the assembly and construction drawings and design data for the motors; delayed placing its order for the motors with its supplier until after the prescribed time for submission of the drawings and design data; failed to call the supplier's attention to the deadlines; after receiving the drawings from its supplier delayed submitting them to the Government, and failed to show that production of the motors by the supplier was delayed by an act of the Government, the contractor has not met the burden of proving that it is entitled to an additional extension of time based on an excusable delay under the delays-damages clause.

Appeal of C. H. Wheeler Manufacturing Company (Economy Pumps, Inc., Division), IBCA-127
(Sept. 12, 1958) 65 I. D. 382

Failure by a contractor to commence work within the time prescribed by the contract does not, in and of itself, disentitle the contractor to extensions of time on account of events, such as unusually severe weather, that are excusable under the terms of the contract and that occur while he is engaged in active prosecution of the contract work. Thus, a contractor engaged in the installation of a series of irrigation structures is entitled to an extension of time on account of soggy soil conditions that seriously impeded the delivery of ready-mix concrete to the structure sites, and that were brought about by unusually severe weather which had the twin effects of deferring the spring thaw beyond its usual time and of intensifying and prolonging its consequences, notwithstanding the fact that he had deferred operations until the spring in order to avoid the adverse working conditions normally prevailing during the winter months.

Appeal of J. W. Merz, IBCA-64 (Mar. 10, 1959)

Although the "disputes" clause of the U. S. standard form of construction contract provides that in connection with an appeal the contractor shall be afforded an opportunity to offer evidence in support of its appeal, and the regulations governing procedure before the Board

CONTRACTS--Continued

DAMAGES--Continued

Liquidated Damages--Continued

provide for a hearing if the appeal involves disputed issues of fact, they contemplate that a hearing for the purpose of taking testimony shall be mandatory only when appellant has tendered issues of fact that are genuine and material. Hence, a request for a hearing made by a contractor engaged in constructing an access road to a Bonneville transmission line who pleads no excusable cause of delay but attacks the validity and effect of the liquidated damages provision itself need not be granted, and the appeal may be decided on the written record. In particular, no genuine and material issue of fact is raised by the allegation that unnamed Bonneville inspectors assured the contractor that there was no urgent need for the access road, since such assurances would be unauthorized even if made, and hence could not form the basis for a waiver of the liquidated damages provision. The fact that the liquidated damages imposed on the contractor exceeded the amount of the consideration for the performance of the work is in itself immaterial.

Appeal of Parker-Schram Company, IBCA-96 (Apr. 7, 1959) 66 I. D. 142

A contractor which was required to prepare and furnish aerial photographs and topographic maps for an irrigation project within a specified time and which under the terms of the specifications was subject to the imposition of liquidated damages for failure to make delivery of such materials on time cannot be said to have effected timely delivery when the materials delivered contained serious defects requiring an extended period for correction.

When the Government was required to inspect and accept the work of a contractor which was required to prepare and furnish aerial photographs and topographic maps, and the contractor contended that the inspection was unreasonably delayed by the Government, it had to establish not only that such delay was unreasonable in the circumstances of the case—which cannot be established merely by allegations in a brief—but also that, but for the duration of the Government's delay, it would have required less time to make the corrections. The recognition by the Government of its own responsibility for part of the delays by not imposing liquidated damages for periods required for inspection and transmission of material does not prevent the apportionment of the remainder of the delays to the contractor. The contract, by providing expressly for excusable causes of delay, including "acts of the Government," inferentially provided for the apportionment of delays.

Appeal of Air Survey Corporation, IBCA-152 (Jun. 30, 1959) 66 I. D. 246

CONTRACTS--Continued

DAMAGES--Continued

Liquidated Damages--Continued

As the validity of a liquidated damages provision depends on the situation which existed when the contract was made, the mere fact that the extent to which damage was actually sustained by the Government becomes uncertain is not sufficient to make the liquidated damages provision unenforceable as a penalty.

Appeal of Truax Machine and Tool Company, IBCA-195 (Jul. 21, 1959)

A contractor, who undertook to fabricate and supply turbines for a power plant, and who seeks to excuse its delays in the performance of the contract on the grounds that its subcontractors were delayed by the occurrence of a steel strike and by work having national priority is not entitled to an extension of time for performance when it has failed to prove either of its contentions by substantial evidence. It is necessary for the contractor to show not only that the steel strike occurred but also that it was a factor responsible for delay.

Appeal of The James Leffel and Company, IBCA-205 (Oct. 8, 1959)

Unliquidated Damages

A claim for damage to and loss of use of contractor's tractor resulting from the performance of emergency work under the alleged direction of Government personnel is in the nature of a claim for unliquidated damages and may not be determined by an administrative officer.

Appeal of Goodfellow Bros., Inc., IBCA-17 (Jan. 10, 1955)

Regulations of the United States Coast Guard restricting the unloading of explosives, which may increase the contractor's costs, are not a changed condition within the meaning of Article 4 of standard contract form 23 (Construction). The term, "unknown conditions of an unusual nature," in this article, is generally applicable to physical conditions. In issuing such regulations, the Government is acting in its sovereign capacity, and a claim for extra compensation resulting therefrom must be regarded as a claim for unliquidated damages which may not be allowed by an administrative officer of the Government.

Appeal of McLaughlin-Incorporated, IBCA-18 (Jan. 13, 1955)

CONTRACTS--Continued

DAMAGES--Continued

Unliquidated Damages (Continued)

Where, after the Government has delayed in furnishing reinforcing steel, the contractor agrees to furnish such steel, and the Government extends the contractor's time for performance of the contract, a claim for alleged equipment rental loss during the period of shutdown due to the unavailability of steel is in the nature of a claim for unliquidated damages, which an administrative official of the Government has no authority to consider or settle.

Appeal of Lowdermilk Brothers, IBCA-10 (Feb. 11, 1955)

A claim for additional compensation which the contractor has calculated simply by deducting the amount of his payments from the amount of his total costs cannot be considered as a composite item. A contractor's total costs may include costs which are in no way attributable to any fault of the Government, or any breach of a contractual obligation by the Government. Even when they include, moreover, claims for damages based on a breach of contractual obligation, they may not be considered administratively because they represent claims for unliquidated damages.

The Government is not liable in damages for delays on its part which are incidental to permitted changes, unless it can be shown that it was negligent. In any event, such claims are for unliquidated damages which the Board is not authorized to consider.

Appeal of M. Hoard, IBCA-6 (May 11, 1955)

A claim for additional compensation to cover increased costs allegedly incurred by a supply contractor because the Government withheld what was contended to be an excessive amount of money to insure that the contractor paid a back-charge for corrective work, and because the Government failed to give notice to the contractor as required by the contract, is in the nature of a claim for unliquidated damages, which an administrative officer of the Government has no authority to consider or settle.

Appeal of Southwest Welding and Manufacturing Company, IBCA-33 (June 29, 1955) 62 I. D. 257

CONTRACTS--Continued

DAMAGES--Continued

Unliquidated Damages--Continued

A claim for additional compensation to cover increased costs allegedly incurred by a contractor because of the delay of the Government in furnishing materials under a construction contract is in the nature of a claim for unliquidated damages, and an administrative official is without authority to consider such a claim.

Appeal of Fischbach and Moore, IBCA-26 (July 25, 1955)

A claim for additional compensation based upon increased costs incurred by a contractor because the Government allegedly violated certain provisions in a construction contract which were construed by the contractor to require the Government to store building equipment to be used in the performance of the contract pending shipment of such equipment to the site of the work, is in the nature of a claim for unliquidated damages, which an administrative official of the Government is without authority to consider.

Appeal of Alfred S. Teller and Theodore A. Johnson, d/b/a Teller Construction Company, IBCA-30 (Aug. 1, 1955)

To the extent that the Government may have withheld from the contractor information concerning subsurface conditions, such conduct could only form the basis of a claim for unliquidated damages which the Board lacks jurisdiction to consider.

Appeal of Carson Construction Company, IBCA-12 (Aug. 19, 1955) 62 I. D. 311

When in the performance of a contract for the completion of earthwork and structures to be paid for at unit prices, the units of work were estimated, and the specifications included a provision stating that the estimated quantities were approximations for comparing bids, and no claim should be made against the Government for excess or deficiency therein, claims of the contractor for additional compensation based on large overruns in the estimated quantities, which concededly did not result from changes in the work within the meaning of the "changes" article in the standard form of Government construction contract, are claims for breach of an implied condition of reasonability in the performance of

CONTRACTS--Continued

DAMAGES--Continued

Unliquidated Damages--Continued

the contract, and, as such, are claims for unliquidated damages which the Board lacks jurisdiction to consider or allow. Even though the Government erroneously estimated one of the units of work, the contract may not be reformed on the ground of mutual mistake of fact, since there was no agreement to perform so much work for a lump sum but only an agreement to perform an approximate quantity of work at so much a unit of work.

Appeal of R. P. Shea Company, 1BCA-37 (Nov. 30, 1955) 62 I. D. 456

Where the Government delayed in delivery of certain necessary materials and furnished structural steel, which required refabrication, causing further delay, a claim for the alleged loss of stand-by labor and equipment rental costs by the contractor is in the nature of a claim for unliquidated damages which an administrative official of the Government is without authority to consider or settle.

Appeal of Knox Construction Company, 1BCA-38 (Dec. 12, 1955)

A claim for additional compensation to cover increased costs incurred by a contractor because of an allegedly unreasonable delay of the Government in furnishing materials under a construction contract which provides that "the Government may at any time suspend the whole or any portion of the work under this contract but this right to suspend the work shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension," is in the nature of a claim for unliquidated damages and is not within the authority of administrative officials of the Government to consider or allow, when the contracting officer never issued a suspension order.

Appeal of Electric Engineering and Construction Service, Inc., 1BCA-58 (Feb. 29, 1956) 63 I. D. 75

Claims for additional compensation arising out of the construction of the Fort Clark Unit of the Missouri River Basin Project must be rejected, when the claims are either based on alleged extra work which was required by the specifications, or the claims are for unliquidated damages not cognizable by the Board, or the

CONTRACTS--Continued

DAMAGES--Continued

Unliquidated Damages--Continued

contractor failed to protest against the alleged extra work as required by the specifications.

Appeal of Korshoj Construction Co., Inc., 1BCA-9 (May 2, 1956) 63 I. D. 129

While traditionally claims of contractors based on delays of the Government in furnishing materials, facilities or rights under Government construction contracts have been regarded as claims for unliquidated damages which may not be administratively settled, the Administrator of the Bonneville Power Administration possesses such authority under the Bonneville Project Act, as amended, which gives him power to make and modify contracts and compromise or finally settle any claim arising thereunder. As the Bonneville Administrator possesses such a power, and is subject to the supervisory authority of the Secretary of the Interior, the power may also be exercised by the Board in a proper case in the application of its delegated supervisory authority.

The Government was, however, liable for damages for its delay in making available to the contractor a number of danger tree strips adjacent to certain special tracts from which the owners of the tracts rather than the contractor were to remove the merchantable timber. Although these danger tree strips were not made available to the contractor until shortly before the final date for completion of the contract, the Government has failed to offer any reasonable explanation for the delay. In this case, the delay must be regarded as especially serious, since it was implicit in the requirements of the contract that the clearing of the special tracts and the felling of the adjacent danger trees would be a related operation.

Appeal of Paul C. Helmick Co., 1BCA-39 (July 31, 1956) 63 I. D. 209

A claim of a contractor based on increased costs sustained as a result of an alleged suspension of work by the Government is a claim for unliquidated damages which may not be administratively allowed, notwithstanding the inclusion in the specifications of a provision relating to costs involved in suspension of work, where the contracting officer never entered a written suspension order.

A claim for compensation on account of damage to one of the tractor bulldozers operated by the contractor, and loss of its use while under

CONTRACTS--Continued

DAMAGES--Continued

Unliquidated Damages--Continued

repair, allegedly caused when the bulldozer struck an underground gas company pipeline, is a claim for unliquidated damages, which may not administratively be settled.

Appeal of J. D. Armstrong Company, Inc., IBCA-40 (Aug. 17, 1956) 63 I. D. 289

A claim for additional compensation based on variations from estimated quantities, which were not the result of any changes in the contract's requirements but were due to faulty estimates originally made by the Government and which, although considerable, were not so great that bad faith on the part of the Government in preparing the specifications could be implied, does not furnish a basis for an equitable adjustment. Although one item in the schedule was entirely deleted, it was only one of a considerable group of closely related items, and it was so trivial in amount compared to the total amount involved in the contract that it would not in itself seem to call for an equitable adjustment. Moreover, in so far as this item or any other item in the contractor's claim may be based on the contention of bad faith on the part of the Government or such unreasonableness of the Government's estimates as would amount to a breach of contract, it would constitute a claim for unliquidated damages which could not be allowed administratively.

Notwithstanding the submission of a construction program by the contractor, a claim for additional compensation based on the alleged failure of the Government to furnish promised equipment in the sequence stipulated in such program is a claim for the allowance of consequential damages for the Government's delay, which the contracting officer was justified in rejecting as a claim for unliquidated damages that could not be settled administratively.

Appeal of A. S. Horner Construction Co., IBCA-75 (Dec. 20, 1956) 63 I. D. 401

A contractor's claim for additional compensation, based on the delay of the Government in making timely delivery of steel members to be incorporated in towers to be erected by the contractor under specifications which did not prescribe the contractor's sequence or mode of operations, nor fix definite dates for the delivery of the steel members, is a claim for unliquidated damages that may not be administratively settled.

Appeal of Parker-Schram Company, IBCA-71 (Jan. 31, 1957)

CONTRACTS--Continued

DAMAGES--Continued

Unliquidated Damages--Continued

A strike precipitated by the decision of a contractor to discontinue paying its employees for travel time when such employees were affiliated with the union that called the strike, and it was customary for employers in the area to pay their employees for travel time, is not an unforeseeable cause of delay beyond the control and without the fault and negligence of the contractor within the meaning of the "delays-damages" clause of the standard form of Government construction contract, and does not entitle the contractor to an extension of time for the performance of the contract so as to avoid the assessment of liquidated damages. The question whether the strike was unforeseeable and beyond the control of the contractor does not necessarily depend on a determination of the legality of the conduct of the contractor or of the union that called the strike. While it is more readily to be expected that the illegal conduct of an employer will lead to a strike, the converse of this proposition is not necessarily true, and there are many circumstances in which an employer can readily foresee that the exercise of his legal rights will lead to a strike and delay the progress of the work.

Appeal of Tri-State Construction Co., IBCA-63 (Feb. 26, 1957) 64 I. D. 38

The total deletion by the Government of an item providing for a select borrow surface course in a contract for the construction of Section "G" of the Richardson Highway in Alaska entitles the contractor to an equitable adjustment under the "changes" article of the contract when the item was deleted because of insufficiency of funds rather than to meet unanticipated field conditions, provided that the contractor has demonstrated a relation of cause and effect between the deletion of the item and the consequences attributed thereto. The contractor is entitled to an equitable adjustment for preparatory work on a specialized plant designed to produce the select borrow material economically but not for another plant which was either not acquired for the sole purpose of performing the deleted item or which was abandoned as the instrument for the performance of the item long before its deletion. On the other hand, the contractor is not entitled to any equitable adjustment by reason of difficulties encountered in finishing the subgrade when such difficulties were due to its own haste and inadequacies in finishing the subgrade prior to the deletion of the surfacing course, or by reason of the prolongation of the work into another operating season when this was due to the same cause, and to the failure of the contractor to give timely notice of completion prior to the onset of winter weather. A highway contractor may not main-

CONTRACTS--Continued

DAMAGES--Continued

Unliquidated Damages--Continued

tain high-salaried employees and equipment during the winter to complete work that had been virtually completed at the close of the prior working season for fear that the Government might require excessive repairs of winter maintenance when such fear proved groundless. In any event, a claim that the failure of the Government to perform its obligations under a contract resulted in the prolongation of the work into another season is a claim for unliquidated damages that may not be administratively settled or allowed.

Appeals of Morrison-Knudsen Company, Inc., IBCA-36 and IBCA-50 (May 27, 1957) 64 I. D. 185

A claim of a contractor for damages for delay in its work and additional expense, allegedly due to the violation by the Government of express or implied obligations of cooperation, is based on a breach of contract, and may not be administratively determined.

A claim of a contractor for costs incurred during a shutdown allegedly due to Government regulation of storage and diversion upstream from a dam, in violation of an express or implied agreement of the Government, is based on a breach of contract, and may not be administratively determined.

Appeal of Paul Jarvis, Inc., IBCA-115 (July 19, 1957) 64 I. D. 285

A claim for additional compensation on the ground that the orderly sequence of the contract work was disrupted, and the performance of the work ultimately brought to a complete stop, by reason of Government delay in furnishing material as required by the contract is not allowable under the present standard form "changed conditions" and "changes" clauses, or under a "suspension of work" clause which reserves to the Government, in general terms, the right to suspend the work and states that "this right to suspend the work shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension." A claim of this character is for damages for breach of contract, and is not within the authority of administrative officers of the Government to determine pursuant to the provisions of the standard form contracts, or such a "suspension of work" clause.

Appeal of Weardco Construction Corporation, IBCA-48 (Sept. 30, 1957) 64 I. D. 376

CONTRACTS--Continued

DAMAGES--Continued

Unliquidated Damages--Continued

A claim of a clearing contractor for additional compensation because of increased costs of performance, and because of a reduction in the sales price of improvements disposable by the contractor under the terms of the contract, which resulted from delays by the Government in furnishing possession of such improvements is based on a breach of contract, and may not be administratively determined.

Appeal of Ideker Construction Company, IBCA-124 (Oct. 3, 1957) 64 I. D. 388

A claim for additional compensation made by a tunneling contractor on the ground that the omission of certain drill hole information from the drawings was a material misrepresentation is a claim for unliquidated damages which could not be considered by the contracting officer, and may not be considered by the Board on appeal.

Appeal of J. A. Terteling & Sons, Inc., IBCA-27 (Dec. 31, 1957) 64 I. D. 466

A claim for additional compensation because of alleged tackiness, incorrect numbering, and poor legibility of aperture cards furnished by the Government to a supply contractor under a contract providing for the establishment of an index of the public land records of the United States that contains "changes" and "extras" articles, but no "changed conditions" article, constitutes a claim for unliquidated damages for breach of contract or misrepresentation, rather than a claim based upon a change in or an addition to the contract, and, therefore, is beyond the jurisdiction of the Board of Contract Appeals to decide.

Appeal of York Tabulating Service, Inc., IBCA-126 (Mar. 7, 1958) 65 I. D. 120

Claims for additional labor, material and supervision costs, for interest on retained percentages, and for job disruption costs that are based upon an alleged failure of the Government to make timely delivery of materials which it had agreed to furnish the contractor are claims for unliquidated damages for breach of contract that are not within the authority of administrative officers of the Government to allow under the standard form of construction contract.

Appeal of Gustav Hirsch Organization, Inc., IBCA-147 (June 30, 1958)

CONTRACTS--Continued

DAMAGES--Continued

Unliquidated Damages--Continued

The Bonneville Power Administration is not responsible for alleged damages sustained by a contractor engaged in the construction of a substation as a result of its delay in making the substation site available to the contractor in the absence of an express promise to make the site available on the date of notice to proceed or the showing of a lack of diligence on its part, particularly when the contractor himself was not fully ready to proceed during the period of delay. Under such circumstances the contractor is entitled only to an extension of time for the delay.

Appeal of W & W Company, IBCA-54 (Aug. 4, 1958)

A claim of a construction contractor for additional compensation because of increased costs of performance of a contract due to extra transportation of equipment to and from the job, partial idling of equipment brought to its site, and extra operations in performing the job, all of which are alleged to have been caused by the Government's delay in furnishing rights-of-way pursuant to the contract, is based on a breach of contract, and may not be administratively determined.

Appeal of Platte Valley Construction Company, IBCA-168 (Aug. 28, 1958)

Claims based on the failure of the Government to perform its obligations under a contract are claims for unliquidated damages which are beyond the jurisdiction of the Board to consider or allow.

Appeal of C. F. Lytle Company and Green Construction Company, IBCA-172 (Sept. 30, 1958)

Claims of a contractor for additional compensation because of delays of the Government in furnishing necessary materials and drawings for the performance of work under a construction contract, which result in increasing the costs of performance, are claims for unliquidated damages for breach of contract that are not within the authority of administrative officers of the Government to consider or allow.

Appeal of Gustav Hirsch Organization, Inc., IBCA-175 (Oct. 30, 1958)

CONTRACTS--Continued

DAMAGES--Continued

Unliquidated Damages--Continued

A claim of a contractor for additional compensation that is based solely upon alleged unreasonable or otherwise improper conduct of the Government in furnishing materials to be installed by a contractor, which results in increasing the cost of performance of a contract, is a claim for unliquidated damages for breach of contract that is not within the authority of administrative officers of the Government to consider or allow.

Appeal of Earl W. Hagerman, d/b/a Hagerman Construction, IBCA-183 (Jan. 21, 1959)

A claim of a contractor for additional compensation on account of monetary losses allegedly resulting from a failure of the Government to make monthly progress payments as provided by the contract is based on a breach of contract, and may not be administratively determined under a standard-form construction contract.

Appeal of J. W. Merz, IBCA-64 (Mar. 10, 1959)

A claim of a reforestation contractor based on the failure of the Government to make available, within the period stipulated in the contract for the performance of the reforestation work, the whole quantity of seedlings which it had agreed to furnish for planting, and on the delay of the Government in making available those seedlings which it did furnish is a claim that is based, not on the deletion of part of the work which the contractor was to perform, but on a breach of contract, and constitutes, therefore, a claim for unliquidated damages which may not be administratively determined.

Appeal of Thomas H. McCready, d/b/a McCready Reforestation Company, IBCA-167 (Jun. 23, 1959)

DELAYS OF CONTRACTOR

The appeal of a contractor from the decision of a contracting officer assessing liquidated damages against the contractor by reason of the late completion of the work under the contract must be dismissed when the contractor failed to give the contracting officer timely notice of the causes of the delay as required by article 9 of the contract. The consideration of the causes of delay by the contracting officer on the merits does not amount to a waiver of the requirement of notice, since the contracting

officer could extend the time for giving notice only with the approval of the head of the Department.

Appeal of Campbell Construction & Equipment Co., IBCA-2 (Jan. 11, 1955) 62 I. D. 6

A request for an extension of time to take care of delays in the performance of a contract that led to the assessment of liquidated damages must be denied when the contractor has failed to meet the burden of proving that an alleged labor shortage was of calculable duration and was attributable to the Korean conflict rather than to its own lack of forethought and diligence. The record indicates that an adequate supply of labor could have been obtained if adequate advance notice had been given to the state employment agency, and adequate housing facilities had been supplied at or near the job site as required by the specifications, and hence the situation cannot be said to have been "beyond the control and without the fault or negligence of the contractor" within the meaning of Article 9 of the standard form of Government construction contract. The Board cannot find that the provisions of the specifications requiring the contractor to furnish adequate housing facilities for workers at the job site were waived by the Government in the absence of positive evidence of such a waiver. The contracting officer has entered no change order eliminating the provisions of the specifications in question, and the Board cannot indulge any presumption that he did so informally in view of the obvious need for the housing facilities. As the housing problem at or near the job site was, moreover, necessarily known to the contractor at the time it bid for the contract, it could have had no connection with the Korean conflict and cannot constitute an "unforeseeable" cause within the meaning of Article 9 of the standard form of Government construction contract.

A request for an extension of time to take care of delays in the performance of a contract that led to the assessment of liquidated damages against a contractor must be denied, notwithstanding the claim that the delays were attributable to the Korean conflict, when the contractor sold machinery in good condition that was usable in the performance of the contract, and subsequently entered into another contract which required the simultaneous use of the available machinery in the performance of both contracts. Moreover, since the contractor was allowed an extension of time for the performance of the contract because of the shortage of parts due to the Korean conflict, the contractor must demonstrate that delays attributed to the unavailability of new machinery were not concurrent with the delays due to the shortage of parts.

Appeal of S. J. Groves & Sons Company, IBCA-8 (April 12, 1955) 62 I. D. 145

Delay in the completion of pumps due to additional model tests voluntarily undertaken by contractor in order to discover cause of vibration in the pumps is not an excusable cause of delay entitling the contractor to the benefits of an escalation clause, even though technical problems of unusual difficulty may have been involved in the manufacture of the pumps, nor can adjustments made in the pumps be held to constitute changes which would entitle the contractor to extensions of time by way of an equitable adjustment under article 2 of the contract when the contractor voluntarily accepted the responsibility for making the changes.

Appeal of the Pelton Water Wheel Company and Byron Jackson Company, IBCA-16 (Oct. 12, 1955) 62 I. D. 385

Delays by a supplier will not excuse the prime contractor from making timely delivery unless the delay resulted from excusable causes of delays within the meaning of the provisions of the contract and specifications. Thus, delay resulting from the fault of a supplier in manufacturing the article ordered is not excusable.

Appeal of Schmitt Steel Co., Inc., IBCA-29 (Nov. 10, 1955)

Where counsel for the Government contends that the delay in the completion of the contract is attributable to the tardiness of the contractor in commencing and prosecuting the work under the contract rather than to weather conditions, and the record shows that the contractor delayed in commencing work for a greater number of days than the probable number of unforeseeable days of bad weather, there is serious doubt that the contractor is entitled to any extension of time at all.

Appeal of Jeneckes', IBCA-44 (Nov. 28, 1955) 62 I. D. 449

Where the contractor, who was engaged in the installation of a curtain in the Carter Barron Amphitheater in Rock Creek Park, Washington, D. C., accepted a change order which involved the operation of the boom and the curtain, so as to increase their operating speed, and the change order also provided for an extension of time of 100 days, delays occasioned by difficulties in procuring a special motor and adjusting electrical controls are not excusable, and the contractor is not entitled to an additional extension of time, which would permit the remission of liquidated damages, since the difficulties were clearly incident to the change, and so came within the scope of the change order. In the absence of any

qualifications, acceptance by the contractor of a change order is legally binding, since it results in a new supplemental contract through modification of the original. The fact that the contracting officer might have granted a longer extension of time than the contractor accepted, and acted upon the assumption that a change order could not be issued unless it included a definite time extension, or stated that no change in time was involved, goes only to the motives of the contracting officer, and does not affect the binding character of the legal obligation. If any mistake of law was made, it was by the contracting officer and was wholly unilateral. But even if there had been a mutual mistake of fact, the change order could not be reformed by the Board, since reformation of contracts is a judicial rather than administrative function.

Appeal of Samuel N. Zarpas, Inc., IBCA-24 (Jan. 4, 1956) 63 I. D. 1

Where a contract provided for an extension of time in case solid rock should be encountered by the contractor in the drilling of a well but also required immediate notice to be given to the contracting officer of the existence of any such condition, the failure of the contractor to comply with this procedural requirement bars consideration on the merits of a request for an extension of time. Even assuming that the procedural requirement could have been waived by the contracting officer, his mere silence cannot be construed as a waiver in the circumstances of this case.

A request for an extension of time, to avoid the assessment of liquidated damages because of delay in the performance of a contract covering the drilling of a well, must be denied when the contractor attributes such delay to difficulties encountered in completing a preceding well-drilling job. To be excusable, the delay must have been "unforeseeable" and "beyond the control" of the contractor. The existence of the previous contract could hardly be said to be unforeseeable, and its execution was subject to the control of the contractor.

Appeal of Carl W. Pistor, IBCA-81 (Dec. 27, 1956)

A strike precipitated by the decision of a contractor to discontinue paying its employees for travel time when such employees were affiliated with the union that called the strike, and it was customary for employers in the area to pay their employees for travel time, is not an unforeseeable cause of delay beyond the control and without the fault and negligence of the contractor within the meaning of the "delays-damages" clause of the standard form of Government construction contract, and does not entitle the contractor to an extension of time for

the performance of the contract so as to avoid the assessment of liquidated damages. The question whether the strike was unforeseeable and beyond the control of the contractor does not necessarily depend on a determination of the legality of the conduct of the contractor or of the union that called the strike. While it is more readily to be expected that the illegal conduct of an employer will lead to a strike, the converse of this proposition is not necessarily true, and there are many circumstances in which an employer can readily foresee that the exercise of his legal rights will lead to a strike and delay the progress of the work.

Appeal of Tri-State Construction Co., IBCA-63 (Feb. 26, 1957) 64 I. D. 38

A delay in the performance of the contract work caused by the contractor's failure to provide enough foremen or workmen with the requisite amount of "know-how" to complete the job within the time specified in the contract is not excusable, for it is the contractor's responsibility to solve the technical problems incident to the performance of the contract work, even though they may be of a novel character, and to provide competent employees in sufficient numbers to complete the job, barring unforeseeable conditions or events, within the specified time.

Where a delay in the performance of the contract work is caused in part by excusable circumstances, such as the encountering of a "changed condition," and in part by inexcusable circumstances, such as a failure by the contractor to make adequate provision for overcoming known or expectable difficulties, an extension of time may be granted for so much of the total period of delay as fairly approximates the amount of time lost by reason of the excusable circumstances, even though the time so lost is not susceptible of precise determination because of the concurrent nature of the various causes of delay.

Appeal of Central Wrecking Corporation, IBCA-69 (Mar. 29, 1957) 64 I. D. 145

A contractor has the burden of proving an excusable basis to be relieved of the payment of liquidated damages and for being granted an extension of time for delay.

Appeal of Zinsco Electrical Products, IBCA-104 (June 3, 1957)

CONTRACTS--Continued

DELAYS OF CONTRACTOR--Continued

An extension of time on account of a delay in obtaining materials alleged to have been caused by a strike is not allowable in the absence of evidence indicating the extent to which the time consumed in obtaining materials exceeded the time which would have been so consumed if there had been no strike. Under a contract which provides that extensions of time on account of difficulties in obtaining materials "will apply only to the particular item and such work directly affected by such delay, and not to the entire contract," an extension of the final completion date of the contract on account of an excusable difficulty in obtaining materials is not allowable in the absence of evidence that such difficulty, rather than a lack of diligence by the contractor in prosecuting portions of the job not dependent upon receipt of the materials, was the real cause of the failure to complete the contract work on time. An extension of time on account of a delay in obtaining materials caused by a strike that had been long in existence when the contract was made is not allowable in the absence of evidence that the delay was caused by circumstances, relating to the period after the contract was made, which the contractor could not reasonably have anticipated when the contract was made, and which were beyond his control.

Appeal of Elmer A. Roman, IBCA-57 (June 28, 1957)

Under a supply contract under which the delays of a contractor were excusable when due to causes beyond its control and without its fault or negligence, and the delays of a subcontractor were excusable when due to the same causes, a steamship company cannot be regarded as a "subcontractor" of a supply contractor, which was late in effecting shipment of an autotransformer as required by the contract, so that its delays would excuse those of the contractor. The steamship company was rather an agent of the contractor for the purpose of effecting delivery of the autotransformer, and the delays of the agent are chargeable to its principal, even though such delays may have been beyond its control and without its fault or negligence.

Upon a supply contract requiring the delivery of an autotransformer to an American shipping point by a certain date, and requiring its shipment on a United States flag commercial vessel, it was the duty of the contractor to complete its manufacture and effect its delivery early enough to insure its delivery at an American port by an American vessel within the time prescribed by the contract, unless excusable causes of delay intervened.

Appeal of the Legnano Electric Corporation, IBCA-114 (Dec. 18, 1957)

CONTRACTS--Continued

DELAYS OF CONTRACTOR--Continued

A tunneling contractor seeking an additional extension of time to cancel an assessment of liquidated damages on the ground that it had to remove the tunnel inverts in winter weather by reason of delays of the Government in procuring steel must be denied relief when it appears that the Government's delay actually gave the contractor a more favorable period of performance than it would have had if the delay had never occurred, and the contractor has not shown that it encountered during the period of performance "unusually severe weather" or other excusable causes of delay within the meaning of the "delays-damages" provision of the U. S. standard form of Government construction contract. On the contrary, the record shows that the causes of delay, far from being excusable, were the fault of the contractor.

Appeal of J. A. Terteling & Sons, Inc., IBCA-27 (Dec. 31, 1957) 64 I. D. 466

When a contractor who was seeking an extension of time for the performance of a contract claimed that the cause of delay in completion was attributable to the conduct of an inspector who had died before the completion of the contract and that he had been dissuaded from notifying the contracting officer of the cause of the delay by the assurance of the inspector that he would be granted an extension of time, the Board will not disturb the decision of the contracting officer that an extension of time should be denied because of the failure of the contractor to give written notice of the cause of the delay in the absence of proof that the merits of the claim could still be ascertained and that the inspector gave the assurance claimed.

Appeal of Utility Construction Company, IBCA-149 and IBCA-161 (June 19, 1958) 65 I. D. 278

Under the standard-form "excusable causes of delay" provision, a delay in delivering equipment is not excusable on the ground that the contractor learned from Government sources of a deferment of the construction of the plant in which the equipment was to be installed, and assumed that by reason of such deferment the Government would not require it to make delivery within the time specified in the contract.

Appeal of Fairbanks, Morse & Co., IBCA-146 (Aug. 11, 1958) 65 I. D. 321

A claim of a contractor for an extension of time based on delay in securing performance and payment bonds, due to the unexpected

DELAYS OF CONTRACTOR--Continued

liquidation of its bonding company, must be denied, even if it be assumed for the sake of argument that this event was unforeseeable, when it is wholly speculative whether the delay actually made any difference to the contractor. Even if the contractor had been able to obtain the bonds sooner, it does not follow that it would necessarily have been given notice to proceed any earlier than it was given. Moreover, the contractor has not shown that it would have obtained a more favorable performance period if the delay had not occurred.

A contractor who is entitled to an extension of time for performance by reason of such an unforeseeable cause as "unusually severe weather" is nonetheless entitled to such relief, despite the fact that its progress schedule, which it was required by the specifications to furnish to the Government merely for the latter's information, may have indicated that no work was originally scheduled during part of the period when the unusually severe weather occurred.

Appeal of Black Hills Ditching Co., Inc., IBCA-145 (Aug. 15, 1958) 65 I. D. 342

A contractor who seeks an extension of time under a standard form construction contract because of an alleged excusable cause of delay has, in general, the burden of proving that the alleged cause of delay actually existed, that it met the criteria of excusability prescribed by the contract, that it delayed the orderly progress or ultimate completion of the contract work as a whole, and that it did so for a given period of time.

Appeal of Larsen-Meyer Construction Co., IBCA-85 (Nov. 24, 1958) 65 I. D.463

Failure by a contractor to commence work within the time prescribed by the contract does not, in and of itself, disentitle the contractor to extensions of time on account of events, such as unusually severe weather, that are excusable under the terms of the contract and that occur while he is engaged in active prosecution of the contract work. Thus, a contractor engaged in the installation of a series of irrigation structures is entitled to an extension of time on account of soggy soil conditions that seriously impeded the delivery of ready-mix concrete to the structure sites, and that were brought about by unusually severe weather which had the twin effects of deferring the spring thaw beyond its usual time and of intensifying and prolonging its consequences, notwithstanding the fact that he had deferred operations until the spring in order to avoid the adverse working conditions normally prevailing during the winter months.

Appeal of J. W. Merz, IBCA-64 (Mar. 10, 1959)

DELAYS OF CONTRACTOR

Bridge construction contractors who in pouring concrete for the decks of two bridges constructed by them were required to do so in a particular sequence or manner, which necessitated the installation of construction joints not contemplated by the specifications, were directed to perform extra works, and hence are entitled to additional compensation and extensions of time for the performance of the work.

Bridge construction contractors, who were required to paint the steel work of the bridges constructed by them and who were delayed in the completion of the work due to their inability to identify the proper types of paint required by the specifications, are not entitled to an extension of time for performance when it appears that the paint types were sufficiently identifiable by reference to specifications of the American Association of State Highway Officials.

Appeal of Cox and Haddox, IBCA-155 (Mar. 26, 1959) 66 I. D. 97

When the Government was required to inspect and accept the work of a contractor which was required to prepare and furnish aerial photographs and topographic maps, and the contractor contended that the inspection was unreasonably delayed by the Government, it had to establish not only that such delay was unreasonable in the circumstances of the case—which cannot be established merely by allegations in a brief—but also that, but for the duration of the Government's delay, it would have required less time to make the corrections. The recognition by the Government of its own responsibility for part of the delays by not imposing liquidated damages for periods required for inspection and transmission of material does not prevent the apportionment of the remainder of the delays to the contractor. The contract, by providing expressly for excusable causes of delay, including "acts of the Government," inferentially provided for the apportionment of delays.

A contractor which was required to prepare and furnish aerial photographs and topographic maps for an irrigation project within a specified time and which under the terms of the specifications was subject to the imposition of liquidated damages for failure to make delivery of such materials on time cannot be said to have effected timely delivery when the materials delivered contained serious defects requiring an extended period for correction.

Appeal of Air Survey Corporation, IBCA-152 (Jun. 30, 1959) 66 I. D. 246

The mere delay of a supplier in delivering materials which are necessary to enable a contractor to perform is not in itself sufficient to constitute an excusable cause of delay.

Appeal of Truax Machine & Tool Company, IBCA-195 (Jul. 21, 1959)

CONTRACTS--Continued

DELAYS OF CONTRACTOR--Continued

A contractor, who undertook to fabricate and supply turbines for a power plant, and who seeks to excuse its delays in the performance of the contract on the grounds that its subcontractors were delayed by the occurrence of a steel strike and by work having national priority is not entitled to an extension of time for performance when it has failed to prove either of its contentions by substantial evidence. It is necessary for the contractor to show not only that the steel strike occurred but also that it was a factor responsible for delay.

Appeal of The James Leffel and Company, IBCA-205 (Oct. 8, 1959)

When a contractor has appealed from findings and decisions of a contracting officer, rejecting his claims for additional compensation and extensions of time for performance of the contract, which was for the construction of a fish cultural station, but has done no more to prosecute the appeal than to file a notice of appeal charging in general terms that the findings and decisions were erroneous, arbitrary, and unfair, the Board will only examine the record to the extent necessary to determine whether there were committed any errors manifest on its face.

Appeal of Sterling Engineering & Construction Company, Inc., IBCA-122 (Oct. 23, 1959)

DELAYS OF GOVERNMENT

Where, after the Government has delayed in furnishing reinforcing steel, the contractor agrees to furnish such steel, and the Government extends the contractor's time for performance of the contract, a claim for alleged equipment rental loss during the period of shutdown due to the unavailability of steel is in the nature of a claim for unliquidated damages, which an administrative official of the Government has no authority to consider or settle.

Appeal of Lowdermilk Brothers, IBCA-10 (Feb. 11, 1955)

The Government is not liable in damages for delays on its part which are incidental to permitted changes, unless it can be shown that it was negligent. In any event, such claims are for unliquidated damages which the Board is not authorized to consider.

Appeal of M. Hoard, IBCA-6 (May 11, 1955)

CONTRACTS--Continued

DELAYS OF GOVERNMENT--Continued

Where the Government delayed in delivery of certain necessary materials and furnished structural steel, which required refabrication, causing further delay, a claim for the alleged loss of stand-by labor and equipment rental costs by the contractor is in the nature of a claim for unliquidated damages which an administrative official of the Government is without authority to consider or settle.

Appeal of Knox Construction Company, IBCA-38 (Dec. 12, 1955)

A claim for additional compensation to cover increased costs incurred by a contractor because of an allegedly unreasonable delay of the Government in furnishing materials under a construction contract which provides that "the Government may at any time suspend the whole or any portion of the work under this contract but this right to suspend the work shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension," is in the nature of a claim for unliquidated damages and is not within the authority of administrative officials of the Government to consider or allow, when the contracting officer never issued a suspension order.

Appeal of Electric Engineering and Construction Service, Inc., IBCA-58 (Feb. 29, 1956) 63 I. D. 75

The Government was not liable for its delay in making available to the contractor two tracts of the right-of-way which were to be acquired from the Northern Pacific Railroad when the Government was diligent both in initiating and prosecuting the negotiations for the acquisition of these tracts. The obstacles which the Government encountered were wholly unexpected, and could not be overcome by any measures on its part short of the institution of condemnation proceedings, which were ordinarily undertaken only as a last resort, and the Government, moreover, was encouraged to be patient by a statement of the contractor's chief officer that he was not planning to operate on these tracts that year. Statements made by Government personnel at an award meeting concerning the probable date of the acquisition of these tracts were mere statements of expectations, and hence cannot be regarded as promissory in nature. While the contract provided that the Government would make every reasonable effort to secure the rights-of-way in advance of clearing operations, this was not tantamount to a promise that the rights-of-way would be available within a reasonable time.

CONTRACTS--Continued

DELAYS OF GOVERNMENT--Continued

The Government was, however, liable for damages for its delay in making available to the contractor a number of danger tree strips adjacent to certain special tracts from which the owners of the tracts rather than the contractor were to remove the merchantable timber. Although these danger tree strips were not made available to the contractor until shortly before the final date for completion of the contract, the Government has failed to offer any reasonable explanation for the delay. In this case, the delay must be regarded as especially serious, since it was implicit in the requirements of the contract that the clearing of the special tracts and the felling of the adjacent danger trees would be a related operation.

The judicial doctrine that even though the parties to a contract contemplate delay in performance, and under the terms of the contract the Government is expressly exculpated from liability for damages, by reason of the delay, the contract is nevertheless subject to an implied condition that the Government will not cause unreasonable delay was clearly applicable to a contract between the Bonneville Power Administration and a contractor for the construction of a transmission line when the specifications under the contract included a provision that the Government would make "every reasonable effort" to secure rights-of-way for the contractor in advance of its clearing operations.

Appeal of Paul C. Helmick Co., IBCA-39 (July 31, 1956) 63 I. D. 209

A claim of a contractor based on increased costs sustained as a result of an alleged suspension of work by the Government is a claim for unliquidated damages which may not be administratively allowed, notwithstanding the inclusion in the specifications of a provision relating to costs involved in suspension of work, where the contracting officer never entered a written suspension order.

Appeal of J. D. Armstrong Company, Inc., IBCA-40 (Aug. 17, 1956) 63 I. D. 289

Notwithstanding the submission of a construction program by the contractor, a claim for additional compensation based on the alleged failure of the Government to furnish promised equipment in the sequence stipulated in such program is a claim for the allowance of consequential damages for the Government's delay, which the contracting officer was justified in rejecting as a claim for unliquidated damages that could not be settled administratively.

CONTRACTS--Continued

DELAYS OF GOVERNMENT--Continued

Extra work, made necessary by a change ordered by the contracting officer in the prescribed sequences or modes of operation, conceivably might be the basis of a valid claim for additional compensation which could administratively be allowed, notwithstanding the fact that the work was ordered for the purpose of avoiding or mitigating delays caused by failure of the Government to furnish equipment on time. The requisites for an administrative allowance of additional compensation, however, do not exist in a case where the sequences or modes of operation were not prescribed by the contract or an approved construction program; where the work performed for the purpose of avoiding or mitigating the Government-caused delays was work of a type provided for in the specifications; and where, in any event, there is no showing that the work was performed as an extra.

Appeal of A. S. Horner Construction Co., IBCA-75 (Dec. 20, 1956) 63 I. D. 401

A contractor's claim for additional compensation, based on the delay of the Government in making timely delivery of steel members to be incorporated in towers to be erected by the contractor under specifications which did not prescribe the contractor's sequence or mode of operations, nor fix definite dates for the delivery of the steel members, is a claim for unliquidated damages that may not be administratively settled.

Appeal of Parker-Schram Company, IBCA-71 (Jan. 31, 1957)

A claim for additional compensation on the ground that the orderly sequence of the contract work was disrupted, and the performance of the work ultimately brought to a complete stop, by reason of Government delay in furnishing material as required by the contract is not allowable under the present standard form "changed conditions" and "changes" clauses, or under a "suspension of work" clause which reserves to the Government, in general terms, the right to suspend the work and states that "this right to suspend the work shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension." A claim of this character is for damages for breach of contract, and is not within the authority of administrative officers of the Government to determine pursuant to the provisions of the standard form contracts, or such a "suspension of work" clause.

Appeal of Weardco Construction Corporation, IBCA-48 (Sept. 30, 1957) 64 I. D. 376

CONTRACTS--Continued

DELAYS OF GOVERNMENT--Continued

A claim for additional compensation on the ground that contract work was delayed by reason of Government delay in furnishing material as required by the contract is not allowable under the provisions of the standard form of Government construction contract, or under the "suspension of work" clause used in Bureau of Reclamation contracts.

Appeal of Union Electric Company, IBCA-88 (Oct. 2, 1957)

A claim of a clearing contractor for additional compensation because of increased costs of performance, and because of a reduction in the sales price of improvements disposable by the contractor under the terms of the contract, which resulted from delays by the Government in furnishing possession of such improvements is based on a breach of contract, and may not be administratively determined.

Appeal of Ideker Construction Company, IBCA-124 (Oct. 3, 1957) 64 I. D. 388

A tunneling contractor seeking an additional extension of time to cancel an assessment of liquidated damages on the ground that it had to remove the tunnel inverts in winter weather by reason of delays of the Government in procuring steel must be denied relief when it appears that the Government's delay actually gave the contractor a more favorable period of performance than it would have had if the delay had never occurred, and the contractor has not shown that it encountered during the period of performance "unusually severe weather" or other excusable causes of delay within the meaning of the "delays-damages" provision of the U. S. standard form of Government construction contract. On the contrary, the record shows that the causes of delay, far from being excusable, were the fault of the contractor.

Appeal of J. A. Terteling & Sons, Inc., IBCA-27 (Dec. 31, 1957) 64 I. D. 466

Claims for costs incurred as a result of an alleged failure of the Government to make timely delivery of promised materials are not within the authority of administrative officers of the Government to allow under the form of "suspension of work" clause customarily used in Bureau of Reclamation construction contracts.

CONTRACTS--Continued

DELAYS OF GOVERNMENT--Continued

Claims for additional labor, material and supervision costs, for interest on retained percentages, and for job disruption costs that are based upon an alleged failure of the Government to make timely delivery of materials which it had agreed to furnish the contractor are claims for unliquidated damages for breach of contract that are not within the authority of administrative officers of the Government to allow under the standard form of construction contract.

Appeal of Gustav Hirsch Organization, Inc., IBCA-147 (June 30, 1958)

The Bonneville Power Administration is not responsible for alleged damages sustained by a contractor engaged in the construction of a substation as a result of its delay in making the substation site available to the contractor in the absence of an express promise to make the site available on the date of notice to proceed or the showing of a lack of diligence on its part, particularly when the contractor himself was not fully ready to proceed during the period of delay. Under such circumstances the contractor is entitled only to an extension of time for the delay.

Appeal of W & W Company, IBCA-54 (Aug. 4, 1958)

A claim of a contractor for an extension of time based on the theory that the Government was obligated to notify it immediately of the award of the contract must be rejected when under the terms of the bid form the Government was allowed 60 days to accept or reject the bid, and notification was given long before the expiration of this period. Moreover, since bids are opened publicly, the contractor could readily have ascertained whether it was the successful bidder.

Appeal of Black Hills Ditching Co., Inc., IBCA-145 (Aug. 15, 1958) 65 I. D. 342

A claim of a construction contractor for additional compensation because of increased costs of performance of a contract due to extra transportation of equipment to and from the job, partial idling of equipment brought to its site, and extra operations in performing the job, all of which are alleged to have been caused by the Government's delay in furnishing rights-of-way pursuant to the contract, is based on a breach of contract, and may not be administratively determined.

Appeal of Platte Valley Construction Company, IBCA-168 (Aug. 28, 1958)

CONTRACTS--Continued

DELAYS OF GOVERNMENT--Continued

Claims of a contractor for additional compensation because of delays of the Government in furnishing necessary materials and drawings for the performance of work under a construction contract, which result in increasing the costs of performance, are claims for unliquidated damages for breach of contract that are not within the authority of administrative officers of the Government to consider or allow.

Appeal of Gustav Hirsch Organization, Inc., IBCA-175 (Oct. 30, 1958)

A claim of a contractor for costs incurred as a result of an alleged failure of the Government to make timely delivery of promised equipment is not within the authority of administrative officers of the Government to allow under the form of "suspension of work" clause customarily used in Bureau of Reclamation construction contracts.

Appeal of Hall-Atwater, Inc., IBCA-176 (Nov. 25, 1958)

A claim of a reforestation contractor based on the failure of the Government to make available, within the period stipulated in the contract for the performance of the reforestation work, the whole quantity of seedlings which it had agreed to furnish for planting, and on the delay of the Government in making available those seedlings which it did furnish is a claim that is based, not on the deletion of part of the work which the contractor was to perform, but on a breach of contract, and constitutes, therefore, a claim for unliquidated damages which may not be administratively determined.

Appeal of Thomas H. McCready, d/b/a McCready Reforestation Company, IBCA-167 (Jun. 23, 1959)

When the Government was required to inspect and accept the work of a contractor which was required to prepare and furnish aerial photographs and topographic maps, and the contractor contended that the inspection was unreasonably delayed by the Government, it had to establish not only that such delay was unreasonable in the circumstances of the case—which cannot be established merely by allegations in a brief—but also that, but for the duration of the Government's delay, it would have required less time to make the corrections. The recognition by the Government of its own responsibility for part of the delays by not imposing liquidated damages for periods required for inspection and transmission of material does not prevent the apportionment of the remainder of the delays to the contractor. The contract, by providing expressly for excusable causes of delay, including "acts of the Government," inferentially provided for the apportionment of delays.

Appeal of Air Survey Corporation, IBCA-152 (Jun. 30, 1959) 66 I. D. 246

CONTRACTS--Continued

DISCRIMINATION

Other than in contracts for the construction of projects undertaken pursuant to the Navajo-Hopi Rehabilitation Act of April 19, 1950 (64 Stat. 44, 45; 25 U.S.C. 633), the provisions in construction contracts executed by officers of the Bureau of Indian Affairs which require contractors to afford Indians a preference right to employment is in conflict with the non-discrimination requirement of E.O. 10557 (19 F.R. 5655; September 3, 1954) and should be discontinued.

Non-Discrimination by Government Contractors, M-36285 (June 15, 1955)

DRAWINGS

Where under a contract for the construction of a high school in the Virgin Islands, one of the specifications required the installation of an electrical tie-in between the vault in the school and a hospital, "as indicated on the plan," but the plan itself consisted of two drawings, each of which bore the notation "to hospital, N.I.C.," meaning "Not In Contract," there is an ambiguity in the contract rather than a conflict between the specification and the drawings, and the ambiguity must be resolved in favor of the contractor by not requiring it to install the tie-in. This is in accordance with the rule that any ambiguity in a Government contract must be resolved against the Government, which drafted the contract.

Appeal of the Fluor Corporation, Ltd., IBCA-53 (Jan. 23, 1956) 63 I. D. 24

A contractor is not entitled to additional compensation by reason of an overrun in compacted embankment work over the estimated amount of such work indicated in the schedule, notwithstanding that this estimate was erroneous, when the specifications included an approximate quantities provision; when the amount of compaction work actually required of the contractor conformed to the dimensions and standards prescribed by the drawings and specifications; and when the contractor could have roughly computed this amount from the drawings before submitting its bid. A memorandum issued by one of the Government engineers to the contractor at its request in which the compacted and uncompacted embankment work remaining to be done was computed in tabular form in general conformity with the requirements of the specifications and drawings did not constitute a change within the

CONTRACTS--Continued

DRAWINGS--Continued

meaning of the "changes" article of the contract, and hence did not entitle the contractor to additional compensation.

Appeal of J. D. Armstrong Company, Inc., IBCA-40 (Aug. 17, 1956) 63 I. D. 289

When a supply contract provides that the contractor's drawings shall show all changes and revisions with revision dates and the period of time allowed for shipment will be exclusive of any time in excess of 30 calendar days required for the approval of any drawing or group of drawings submitted simultaneously, the contracting officer has 30 days to approve or correct each drawing or group of drawings.

Appeal of Zinsco Electrical Products, IBCA-104 (June 3, 1957)

The existence of an error in calculating an estimated quantity of excavation and of a further unexplained discrepancy between the estimated quantity of excavation and the actual excavation does not in itself establish that a contracting officer was wrong in finding and concluding that the contractor could have made a sufficiently accurate calculation of the probable amount of the excavation by utilizing information supplied by the drawings and specifications, and that, in view of the approximate quantities provision included in the specifications, additional compensation could not be allowed by reason of a substantial underrun below the estimated quantity.

Appeal of the Diamond Engineering Company, IBCA-93 (Dec. 20, 1957)

A claim for additional compensation made by a tunneling contractor on the ground that it encountered "changed conditions" within the meaning of the first category of conditions specified in the U. S. standard form of Government construction contract, namely conditions materially different from those indicated by the drawings or specifications, cannot be allowed where the specifications provided that the geological conditions were not guaranteed, and that no additional allowance would be made for tunnel excavation on account of the nature or condition of any of the material encountered, and the drawings, although they contained in summary form logs of exploration, or drill hole information, were in themselves only representations of what was found in the particular drill holes rather than representations of what the contractor would encounter in actual excavation.

CONTRACTS--Continued

DRAWINGS--Continued

A claim for additional compensation made by a tunneling contractor on the ground that the omission of certain drill hole information from the drawings was a material misrepresentation is a claim for unliquidated damages which could not be considered by the contracting officer, and may not be considered by the Board on appeal.

A claim for additional compensation made by a tunneling contractor on the ground that it encountered "changed conditions" within the meaning of the second category of conditions specified in the U. S. standard form of Government construction contract, namely conditions of such an unusual nature that they could not reasonably have been anticipated by the contractor, may be allowed notwithstanding the inclusion of caveatory, or exculpatory provisions in the specifications. Nevertheless, the burden of proving a claim in the second category is a fairly heavy one, since the contractor must show not only that it encountered conditions that were unexpected to it but also that the conditions encountered would have been generally regarded as unexpected by others engaged in the same type of operations. Therefore, such a claim must be rejected when the record shows that the contractor made only a hurried and casual prebid investigation; the specifications required the tunnels constructed to be fully supported; the drill hole information indicated the possibility of encountering adverse geological conditions; and the percentage of overbreak experienced by the contractor was only slightly more than should have been expected in view of the geological conditions, and the slight excess may have been attributable to the contractor's methods of operation.

Appeal of J. A. Terteling & Sons, Inc., IBCA-27 (Dec. 31, 1957) 64 I. D. 466

Additional compensation, sought after completion of all of the work, for an overrun in masonry work in the construction of a culvert in Rock Creek Park, due to a discrepancy between the drawings and one of the notes on the drawings, must be denied, where the contractor failed to comply with the terms of the contract and specifications which required that it call such discrepancies to the attention of the contracting officer and warned that any work performed without his determination would be at its own risk and expense.

Appeal of General Excavating Company, IBCA-150 (May 25, 1959)

A claim for additional compensation by a contractor under the first category of the "changed conditions" clause of the contract, relating to divergent conditions, as distinguished

CONTRACTS--Continued

DRAWINGS--Continued

from the second category of "changed conditions," relating to unanticipated conditions, on the ground that it encountered large quantities of hard material which, in view of the logs of subsurface exploration made available to it in the drawings, it could not reasonably have expected must be denied when the logs of exploration were outside the area to be excavated, and did not generally penetrate to grade, and in any event indicated that large quantities of hard material were present, and the presence of such hard material could have been ascertained by a more adequate site investigation. Whether or not logs of exploration can be regarded as unqualified representations must depend on the circumstances of each individual case. When a contract charges a contractor with the duty of investigating the site of the work, it must make such an investigation, whether or not it is asserting a changed condition in the first or the second category, unless indeed, the claim is based on a representation of such a nature that a site investigation would be completely pointless. However, the standard of adequacy in conducting a site investigation may well be less rigorous in first than in second category cases.

Appeal of Inter-City Sand and Gravel Co. and John Kovtynovich, IBCA-128 (May 29, 1959) 66 I. D. 179

A claim for additional compensation, sought by a contractor after completion of the work, for overruns in the work and materials in the construction of a bridge abutment on the Laguna Indian Reservation, due to a discrepancy between the estimated quantities indicated on the drawing and the work indicated on the drawing itself, against which the estimated quantities could have been checked, must be denied when it appears that the contractor failed to comply with the provision of the U. S. standard form of construction contract, requiring discrepancies in the drawings to be called to the attention of the contracting officer.

Appeal of W. H. Lynch, d/b/a Badger Lynch, Contractors, IBCA-173 (Oct. 27, 1959)

INTERPRETATION

Article 6 of the form of land-purchase contract used by the Bureau of Reclamation for several years prior to its revision in 1952 which provides in pertinent part that the amount paid by the United States for the purchased land should constitute "full payment for all damages for entry upon the said property and the construction, operation, and maintenance of reclamation works thereon * * *" has been interpreted by several rulings of the Solicitor beginning in 1948 to release the Government from liability for damage to remaining lands which

CONTRACTS--Continued

INTERPRETATION--Continued

are appurtenant to the land purchased from the claimant. Such rulings are hereby reversed and claims denied on that basis will be reconsidered on their merits.

Claims of Mr. and Mrs. Arnold Streit and Bertha C. Hurley, T-476 (Ir.)(Supp.) (Jan. 31, 1955) 62 I. D. 12

Under a contract between the Government, now represented by the Southeastern Power Administration and the Georgia Power Company, provision was made for the disposition of the entire output of the Allatoona power project to the Company, and for the operation of the Allatoona Reservoir in accordance with a mutually acceptable rule curve and instructions. The contract also provided that the Company would pay to the Government for the electrical energy equivalent of water wasted due to departure by the Company from the current rule curve and instructions not attributable to a regulation of the Corps of Engineers. In 1951, in order to meet unusual power demands of the Atomic Energy Commission, it was agreed between the parties that the power pool elevation at Allatoona should be raised from elevation 835 to 838, and kept as high as possible consistent with the emergency power demand. Although a rule curve was also prepared in connection with this operation, it was intended to be informal, and to serve merely as a guide to probable operations. The Southeastern Power Administration was aware that operations were not being conducted in accordance with the informal rule curve but acquiesced therein. In these circumstances, the provision of the contract relative to the wasting of water must be held not to have been applicable during the emergency period, and the Georgia Power Company should not have been billed for the electrical energy equivalent of the water wasted at the direction of the Corps of Engineers during the emergency period.

Appeal of Georgia Power Company, IBCA-31 (April 22, 1955)

Although such varying terms as "solid bedrock," "solid rock," or "bedrock" were employed in the plans and specifications, the contractor was not unreasonable in regarding all these terms as synonymous. The term "solid rock" is only a synonym for "bedrock," and the term "solid bedrock" could be regarded by the contractor as mere tautology.

Appeal of Carson Construction Company, IBCA-12 (Aug. 19, 1955) 62 I. D. 311

CONTRACTS--Continued

INTERPRETATION--Continued

When the specifications limited the application of an escalation clause to the period from bidding to shipment, the contractor is not entitled to the benefit of the clause beyond the period when shipment was due, even though after installation of the pumps it was found that adjustments were necessary.

Appeal of the Pelton Water Wheel Company and Byron Jackson Company, IBCA-16 (Oct. 12, 1955) 62 I. D. 385

A claim for additional compensation for supplying an increased quantity of gravel backfill under the concrete floor slab of a building, based on an alleged incorrectness of the elevations shown on a sheet of the plans, must be denied when this sheet did not govern the excavation and fill requirements except to the extent that the compacted fill must be up to or above the column footing elevations set forth, and the plans as a whole indicated what was required of the contractor. The bidder is under a duty to examine all of the drawings, and a misunderstanding growing out of failure to do so cannot prejudice the Government. Effect must be given to all the provisions of the specifications and drawings.

Appeal of Johnson Construction and Maintenance Company, IBCA-15 (Oct. 28, 1955)

A contractor is not entitled to additional compensation for installing a backing of lath and plaster rather than cheaper gypsum board in certain rooms of a high school, even though there was a discrepancy in indicating the type of backing between the applicable drawings and a room finish schedule constituting the last sheet of the drawings. The room finish schedule was not part of the specifications and since the discrepancy was only between two sheets of the drawings, it was to be resolved by submission to the contracting officer as required by the specifications.

Appeals of Carson Construction Company, IBCA-21, IBCA-25, IBCA-28, IBCA-34 (Nov. 22, 1955) 62 I. D. 422

Where under a contract for the construction of a high school in the Virgin Islands, one of the specifications required the installation of an electrical tie-in between the vault in the school and a hospital, "as indicated on the plan," but the plan itself consisted of two drawings, each of which bore the notation "to hospital, N. I. C.," meaning "Not In Contract," there is

CONTRACTS--Continued

INTERPRETATION--Continued

an ambiguity in the contract rather than a conflict between the specification and the drawings, and the ambiguity must be resolved in favor of the contractor by not requiring it to install the tie-in. This is in accordance with the rule that any ambiguity in a Government contract must be resolved against the Government, which drafted the contract.

Appeal of the Fluor Corporation, Ltd., IBCA-53 (Jan. 23, 1956) 63 I. D. 24

A claim for additional compensation to cover increased costs incurred by a contractor because of an allegedly unreasonable delay of the Government in furnishing materials under a construction contract which provides that "the Government may at any time suspend the whole or any portion of the work under this contract but this right to suspend the work shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension," is in the nature of a claim for unliquidated damages and is not within the authority of administrative officials of the Government to consider or allow, when the contracting officer never issued a suspension order.

Appeal of Electric Engineering and Construction Service, Inc., IBCA-58 (Feb. 29, 1956) 63 I. D. 75

Under article 10 of the standard form of Government construction contract which provides that the contractor "shall be responsible for all materials delivered and work performed until completion and final acceptance," and that upon completion of the contract, "the work shall be delivered complete and undamaged," the burden of repairing any damage to work prior to the acceptance thereof is put upon the contractor, notwithstanding the absence of fault on his part. Consequently, a contractor is not entitled to additional compensation when he has been required by the contracting officer to remove from a lateral material blown there by the wind before the work had been accepted.

A contractor is not entitled to additional compensation, under the unit of a schedule for structure excavation, for quantities excavated from previously placed embankments, above the original ground line, around constant head orifice and pipe turnouts, when the specifications contain no provisions which prescribe the nature or the sequence of the contractor's operations; when standard practice in the construction of laterals does not require that the building of the structures be deferred until after all embankment work has been completed; and when the specifications state or import that payment is

to be made only for excavation that is required. The fact that in some of the paragraphs of the applicable specification, which dealt with types of structures not involved in the present claim, it was specifically stated that excavation for structures would be measured for payment "below the original ground surface" does not in itself establish an ambiguity in the applicable paragraphs, which were otherwise clear but omitted this phrase. There are many ways of expressing the same thought, and differences in the use of language do not necessarily betoken differences in meaning and intention.

Appeal of Osberg Construction Company, IBCA-32 (June 19, 1956) 63 I. D. 180

Where the parties to a contract for the clearing of a right-of-way have construed the provisions of the specifications applicable, strictly speaking, only to the right-of-way itself as applicable also to adjacent danger tree areas, the Board will adopt the practical construction put upon the requirements of the contract by the parties themselves.

When the specification governing the clearing of the special tracts and adjacent danger tree strips provided that the landowners would "remove any merchantable timber required to be cut by these specifications," the specification was ambiguous. When all the officers of the Government supervising the performance of the contract, including presumably the contracting officer, assumed that the landowners would both cut and remove the merchantable timber on these tracts and adjacent danger tree strips, and indeed negotiated with the contractor for a long time with respect to additional compensation for cutting the merchantable timber on the danger tree strips, the Board will adopt the practical construction put upon the contract by the parties, especially in view of the familiar rule that any ambiguity in a Government construction contract must be resolved against the Government. Consequently, the contractor is entitled to additional compensation for the extra work which was the subject of the negotiations.

Appeal of Paul C. Helmick Co., IBCA-39 (July 31, 1956) 63 I. D. 209

Although approximate quantities provisions included in specifications have varied greatly in their phraseology, and these variations, particularly when coupled with differences in other provisions of the contract, could conceivably affect the result in individual cases, such provisions have been generally held to mean that the quantities of work actually required to be

performed under the contract, whether greater or less than the quantities stated in the schedule, are to be paid for at the unit prices bid by the contractor, and that the mere existence of an overrun above or an underrun below the schedule quantities is not sufficient cause for the allowance of an equitable adjustment predicated on the actual cost of the work done by the contractor.

Appeal of J. D. Armstrong Company, Inc., IBCA-40 (Aug. 17, 1956) 63 I. D. 289

In construing an ambiguous provision of a contract weight may be given to the practical interpretation placed upon the provision by principal subordinates of the contracting officer who participated actively in its administration.

Appeal of Paul C. Helmick Company, IBCA-39 (Oct. 31, 1956) 63 I. D. 363

A contractor is not entitled to additional compensation for cleaning windblown material from constructed laterals when under the terms of the contract the contractor was required to deliver all work "complete and undamaged," and the contractor has not shown that the Government exceeded its normal rights as a landowner, or was otherwise at fault, in clearing adjoining farm units from which some of the windblown material may have derived. Moreover, even if the fault of the Government were to be presupposed, the restorative work would constitute neither a "change" nor an "extra," and could not, therefore, form a basis for the allowance of additional compensation under the contract.

Appeal of McWaters and Bartlett, IBCA-56 (Oct. 31, 1956)

As questions of the interpretation of contracts are not "questions of fact" within the meaning of that expression in the "disputes" article of standard form Government contracts, a contractor may resort directly to the courts upon such a question without securing a finding of fact or decision by the contracting officer or taking an appeal to the Board of Contract Appeals.

Appeal of Economy Pumps, Inc., Division of C. H. Wheeler Manufacturing Company, IBCA-94 (Feb. 13, 1957)

CONTRACTS--Continued

INTERPRETATION--Continued

Statements in the specifications of a standard form Government contract to the effect that Government-furnished information is not guaranteed, or that bidders are expected to inform themselves of all existing conditions, or that failure to estimate correctly the difficulties attending the execution of the work will not be a basis for relief, supplement the General Provisions of the contract, but do not supersede or override them, and do not preclude the allowance of extensions of time under the "changed conditions" clause in the event the contractor encounters conditions that fairly meet the standards prescribed by that clause.

Appeal of Central Wrecking Corporation, IBCA-69 (Mar. 29, 1957) 64 I. D. 145

Where the specifications contain an approximate quantities provision, a contractor is not entitled to additional compensation by reason of underruns in estimated quantities of crushed-rock blanket and riprap merely because the Government changed the design prior to the advertisement for bids but neglected to correct the estimates, if in fact the schedule quantities could have been verified by the contractor from the information supplied by the drawings and specifications. The mere fact that there was some degree of uncertainty in estimating the quantities from the drawings and specifications is immaterial if the degree of uncertainty was not appreciable.

Appeal of Texas Construction Company and Hyde Construction Company, IBCA-73 (Apr. 23, 1957) 64 I. D. 97

Where the printed form of contract for the sale of materials under the act of July 31, 1947, provides two alternative methods for determining the total price to be paid for the materials, one under which the total price is to be specifically stated in the contract and the other under which the total price is to be determined on the basis of the materials actually removed, and where a contract for the sale of timber was executed on that form from which the second method for determining the price had been stricken, the purchaser's obligation under the contract is to pay the total price specified in the contract, notwithstanding the fact that another, inconsistent, paragraph of the printed form was not deleted from the contract as it should have been.

Russell & Pugh Lumber Company, A-27432 (May 20, 1957)

CONTRACTS--Continued

INTERPRETATION--Continued

A contractor who, in excavating a trench for a sewer in Charlotte Amalie, St. Thomas, Virgin Islands, in an area along the shoreline where a seawall and other waterfront improvements had been installed, encountered an unusually large number of submerged pier piles that were extremely difficult to remove, in addition to piles at a site indicated on a sheet of the drawings as the "Site of Old Pier Piles," is entitled to additional compensation either under the "changed conditions" or "changes" clause of the contract for the work involved in removing such piles. A general site investigation clause included in the specifications was too vague to constitute a sufficient warning of the existence of submerged piling at sites not indicated on the drawings, and the contractor may be said to have encountered a "changed condition" either because the existence of the submerged piling was a subsurface physical condition that differed materially from the representation made in the drawing, or because the number and character of the piles constituted an unknown physical condition of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. To the extent that the submerged piling actually removed was in excess of that indicated on the plans, there was also a "change" in the scope of the work.

A contractor who, in excavating the trench for a sewer in Charlotte Amalie, St. Thomas, Virgin Islands, in an area of hydraulic fill installed in connection with the construction of a seawall, encountered in a large part of the area extremely unstable soil conditions that materially increased the costs of the excavation and made necessary a departure to a large extent from the methods of laying the sewer pipe prescribed in the specifications, is entitled to additional compensation under the "changed conditions" clause of the contract. The statement in the Invitation for Bids that the trench for the sewer was to be in "dredged fill" denoted, especially in connection with the surface appearance of the area, a classified fill rather than a spoil bank area. If the fill was a classified fill, the contractor had no reason to expect the difficulties it actually encountered. While the specifications did suggest the possibility of minor difficulties, they did not suggest the highly abnormal conditions actually encountered by the contractor. Since the sewer line could not be successfully laid by following entirely the methods prescribed in the specifications, and the Government acquiesced in the methods actually employed, the contractor is also entitled to additional compensation under the "changes" clause of the contract.

When the contracting officer has considered claims on their merits, they are not barred by the failure of the contractor to comply with the procedural requirement of written notice of the

CONTRACTS--Continued

INTERPRETATION--Continued

claims, and the circumstance that the claims may have been considered by the contracting officer on the merits only as a matter of grace, may not be given any weight by the Board of Contract Appeals in assessing the merits of the claims on appeal.

Appeal of Caribbean Construction Corporation, 1BCA-90 (June 28, 1957) 64 I. D. 254

An extension of time on account of a delay in obtaining materials alleged to have been caused by a strike is not allowable in the absence of evidence indicating the extent to which the time consumed in obtaining materials exceeded the time which would have been so consumed if there had been no strike. Under a contract which provides that extensions of time on account of difficulties in obtaining materials "will apply only to the particular item and such work directly affected by such delay, and not to the entire contract," an extension of the final completion date of the contract on account of an excusable difficulty in obtaining materials is not allowable in the absence of evidence that such difficulty, rather than a lack of diligence by the contractor in prosecuting portions of the job not dependent upon receipt of the materials, was the real cause of the failure to complete the contract work on time. An extension of time on account of a delay in obtaining materials caused by a strike that had been long in existence when the contract was made is not allowable in the absence of evidence that the delay was caused by circumstances, relating to the period after the contract was made, which the contractor could not reasonably have anticipated when the contract was made, and which were beyond his control.

Appeal of Elmer A. Roman, 1BCA-57 (June 28, 1957)

Under a contract for the alteration of a diversion dam and the enlargement of a canal, the claim of a contractor for compensation to cover the cost of providing added protection for the dam as a result of the closing by the Government of the headworks of the canal in order to control an earth slide which occurred at a time when the contractor, with the permission of the Government, was using the canal for diversion purposes, cannot be allowed under either the "changes" or "changed conditions" clause of the contract. By permitting the contractor to proceed with such water control plan the Government did not warrant that the canal would remain open even if repairs were required because of an accidental earth slide into the canal. A provision of the specifications that the contractor was to pass 800 cfs of water

CONTRACTS--Continued

INTERPRETATION--Continued

through the canal, after the end of the time allowed for its enlargement, did not create a duty on the part of the Government to allow the contractor, under all circumstances, to pass that amount of water through the canal.

Appeal of Paul Jarvis, Inc., 1BCA-115 (July 19, 1957) 64 I. D. 285

A contractor who was performing a contract to rehabilitate an existing irrigation system was obligated under the terms of the contract, which indicated that the work was to be delivered complete and undamaged, to repair the damage to such work caused by flood waters resulting from an unusually heavy rainstorm, even though it may not have been at fault in constructing the protective works required by the specifications. The costs of the repair work cannot be allowed under the "changed conditions" article of the contract.

Appeal of Barnard-Curtiss Company, 1BCA-82 (Aug. 9, 1957) 64 I. D. 312

When there has been a failure to make provision in a contract for the assessment of liquidated damages, such damages may not be assessed against the contractor notwithstanding his failure to urge this as a ground for reversal. Such failure is not an example of "practical construction" of the contract by the parties, which has to do with interpretation of its terms during the period of performance.

As the Comptroller General has held that the term "accompanying papers" in paragraph 5(b) of U. S. Standard Form 23A is not broad enough to include an Invitation for Bids, and the provision for liquidated damages in the present case, although mentioned in the Invitation for Bids, was not included in the contract itself, made on U. S. Standard Form 23, the Government may not assess liquidated damages against the contractor for failure to perform the contract within the stipulated time. The ruling of the Comptroller General is no less applicable because the contracting officer in transmitting the contract to the contractor also sent him a purchase order for the same work. Since the contractor had agreed only to execute the standard form of construction contract, the purchase order must be regarded as an extraneous and unilaterally issued document.

Appeal of Fred Saulsberry, 1BCA-65 (Sept. 13, 1957) 64 I. D. 357

CONTRACTS--Continued

INTERPRETATION--Continued

A provision of the specifications under a Government construction contract for the subjugation of farmland for irrigation purposes that permits the Government to increase or decrease the quantities of work to be performed within a certain percentage limit cannot be construed as an express authorization for the termination of the contract before all the work has been completed under it. Such a provision contemplates rather that the work that is expanded or limited in accordance with its terms shall be performed by the contractor who is already engaged in the work.

Appeal of D. R. Haddox, IBCA-84 (Supp.) (Oct. 18, 1957)

Acceptance by a contractor of a change order which stipulates that no increase in the contract performance time will be allowed "on account of the performance" of the work described in the order does not bar the allowance of an extension of time on account of delays caused by the action of the Government in holding up the job while the advisability of ordering such a change was being considered.

Appeal of Chas. I. Cunningham Co., IBCA-60 (Dec. 6, 1957) 64 I. D. 449

When a supplier maintains that by excluding potheads from its bid it also intended to exclude cable and conduit but that it was misled in conveying its intention by an ambiguity in the form of the invitation, its appeal from a decision of the contracting officer, which was that the supplier was obligated to furnish the cable and conduit, presents an issue of the interpretation of the bid rather than one of mistake in bid. The circumstances of the bid also involve perhaps an issue whether a valid contract at all was made. The interpretation of a bid is a question of law which is within the jurisdiction of the Board.

Appeal of Westinghouse Electric Corporation, IBCA-134 (Jan. 30, 1958) 65 I. D. 45

A contractor engaged in the construction of a helium plant, who was expressly required by the terms of the specifications to make "every reasonable effort" to safeguard the plans for the plant and to assure that its employees were loyal Americans, was impliedly required to bear the cost of a security check of its employees to be made by an outside investigative agency.

Appeal of Quaker Valley Constructors, Inc., IBCA-89 (Jan. 31, 1958) 65 I. D. 53

CONTRACTS--Continued

INTERPRETATION--Continued

Where a contract contains separate unit bid prices for the puddling and for the compaction of backfill, and contains specifications which limit puddling to backfill that is composed of silty material and require compaction for backfill that is composed of sand or gravel, a provision in the contract which authorizes the contracting officer to direct that unsuitable foundation material be removed and replaced with selected material and which states that the puddling or compaction of such refill material shall be paid for at the unit bid price for the puddling or compaction of backfill, as the case may be, is to be interpreted as calling for the compaction, rather than the puddling, of refill material that is composed of sand and gravel.

Appeal of Duncan Construction Company, IBCA-91 (Apr. 2, 1958) 65 I. D. 135

When the Government ordered a supply of copper tubing which was to be used in the fabrication of heat exchangers, and the straightness of the tubes was of "paramount" importance but the specifications, although they included straightness among the characteristics of workmanship, failed to specify a tolerance for straightness, the supplier was entitled to additional compensation for straightening the tubing after delivery in order to meet the Government's requirement for straightness, which allowed a tolerance of only one hundredth of an inch per foot.

Appeal of Atlantic Aluminum & Metal Distributors, Inc., IBCA-129 (Apr. 22, 1958) 65 I. D. 173

When, through clerical error, the continuation sheet make-up of an invitation to bid for the supply of substation equipment and steel framework left doubt as to whether references therein to potheads, cable and conduit were intended to constitute a single subitem or three separate subitems, and the bidder, although on the continuation sheets it expressly excluded only potheads, nevertheless incorporated in the specifications that accompanied its bid an express exclusion of potheads, cable and conduit, the contract resulting from acceptance of the bid must be interpreted as not embracing any of these three categories of materials, even though the acceptance of the bid mentions only potheads as being excluded.

Appeal of Westinghouse Electric Corporation, IBCA-134 (Supp.) (Apr. 30, 1958) 65 I. D. 203

CONTRACTS--Continued

INTERPRETATION--Continued

Under the terms of a supply contract for the improvement of the public land records of the United States in the State of Utah for a lump-sum price which involved the processing of estimated quantities of aperture and cross-reference cards and irregular township plats, but provided that the estimated quantities were subject to a 25 percent increase or decrease, the contractor is entitled to additional compensation only to the extent that the estimated quantities, plus 25 percent, have been exceeded. Such a contract is not ambiguous, nor lacking in mutuality, nor can it be said to have been prematurely made because the Government may not have been in a good position to estimate the quantities at the time the contract was made.

Appeal of Petroleum Ownership Map Company, IBCA-110 (May 29, 1958) 65 I. D. 261

A contract for the delivery of pumping equipment for irrigation purposes which expressly states that liquidated damages will be assessed for each day of delay beyond the time for shipment specified in the contract, and which contains other expressions indicative of an intent to impose liquidated damages for any delay beyond the specified shipment date, but which describes the contemplated possible losses as being crop and other losses resulting from "a delay in the installation of the equipment," is to be interpreted as imposing liquidated damages for each day by which shipment is later than the specified shipment date, even though the equipment is received before it is actually needed for installation.

Appeal of Fairbanks, Morse & Co., IBCA-146 (Aug. 11, 1958) 65 I. D. 321

Where a contract requires notice within a specified period, but does not specify the manner in which notice is to be given, the mere mailing of notice is not sufficient unless it is received within the time specified.

When the cancellation procedure prescribed by a lease contract provides that the lessee may request a hearing within a specified period after a day named, the designated day after which the period of time begins to run is not to be included in the computation. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday.

Uranium Exploration Company of California, IA-913 (Aug. 26, 1958) 65 I. D. 365

CONTRACTS--Continued

INTERPRETATION--Continued

A contractor who is aware of an ambiguity in a Government construction contract with respect to the assembly of individual capacitor units and associated equipment into Var-Blocks is not entitled to the benefit of the rule of interpretation contra proferentem, which would require that the provision be construed against the Government which had drafted it. Having discovered the ambiguity, the contractor is bound to make due and proper inquiry in the effort to secure its clarification. The contractor cannot confine the inquiry to the supplier of the capacitor equipment, especially when it has been put on notice that an authoritative interpretation can be obtained only from the main office of the contracting bureau.

Appeal of Wismer & Becker Electric, Inc., IBCA-136 (Sept. 22, 1958) 65 I. D. 388

A specification provision that payment for material excavated from a borrow pit shall be exclusive of overburden stripped from the pit and that the usable material to be paid for shall be "measured in original position" necessitates a determination of the elevation of the underside of the overburden in its original position before stripping, and is not complied with by a measurement which reflects the size of the whole pit upon completion of all excavation less the volume of the overburden in its position at that time, irrespective of whether or not in such measurement an allowance is made for swelling of the stripped overburden.

Appeal of Larsen-Meyer Construction Co., IBCA-85 (Nov. 24, 1958) 65 I. D. 463

Under specifications which provided that the contractor furnish and install in a compacted state gravel bedding for a concrete lining in an irrigation lateral and that the gravel bedding so installed should be measured for payment in the most practicable manner, either to the outlines of the areas covered with gravel bedding and to an average thickness, or in approved vehicles at the point of delivery, the contracting officer had a choice between these two alternative methods of measuring the gravel bedding for payment. Whichever method was chosen, however, payment would have to be made for the gravel in a compacted state, and, if payment were based on loose truck measurements of the gravel, a compaction factor would have to be applied to the gravel so measured. It is apparent that if either method of measuring the gravel for payment presupposed its measurement in a compacted state, the other method must also presuppose this, since both methods, to be equitable must produce equivalent results. The

CONTRACTS--Continued

INTERPRETATION--Continued

fact that bidders were unable to determine the factor of compaction in advance, since the source of the gravel was subject to the approval of the contracting officer, proves no more than that the contract involved elements of uncertainty or risk for the contractor. Differences of nomenclature to be found in various items of the schedule and specifications with respect to payment do not demonstrate an ambiguity in the provisions for payment of the gravel bedding, since the language was not exactly parallel and the provisions for the performance of the various items differed substantially. The fact that Government inspectors kept a truck count tally of the gravel bedding is not a practical construction requiring payment for the gravel by loose truck measurement, since they reported generally all operations under the contract; the information was useful for other purposes, such as the making of progress payments; and the contracting officer was not bound to determine how the gravel should be paid for until after it had been placed. The contracting officer did not abuse his discretion in paying for the gravel bedding on the basis of cross sections taken prior to the placing thereof, since the record shows that the practice of using cross sections in measuring earthwork for payment is common, and the contractor has failed to bear the burden of proving that there were circumstances that made the use of the cross sections unfair.

Appeal of Glenn Dusky, IBCA-130 (Dec. 11, 1958) 65 I. D. 489

The provision in the standard-form construction contract that the contractor shall at his own expense "obtain all licenses and permits required for the prosecution of the work" does not impose upon a contractor, whose undertakings include installing sanitary plumbing on Government property and connecting such plumbing with a county sewer, the responsibility for paying a charge assessed by the county for the use to be made of the sewer by the Government, nor for solving the impasse created by a conflict between the plumbing specifications of the contract and the county plumbing code. Refusal by the county to issue a permit for the connection save upon condition that such charge be paid and that the specifications be altered to conform to such code constitutes an excusable cause of delay under the standard-form "delays-damages" clause.

Acceptance by a contractor of a change order which stipulated that "the time necessary for the completion of the work" described in the order is a certain number of days and that "the contract time is extended accordingly" does not bar the allowance of a further extension on account of time lost because of the inability of the contractor to perform portions of the original contract work until the Government had removed, through the issuance of the order, an excusable cause of delay.

Appeal of James C. Christopher, d/b/a Christopher Construction Company, IBCA-109 (Mar. 31, 1959) 66 I. D. 117

CONTRACTS--Continued

INTERPRETATION--Continued

When the Government in order to provide a maximum amount of water for irrigation purposes required the contractor to provide for storage of water in a reservoir above the maximum height designated in the contract, either by increasing the height of a temporary cofferdam previously constructed by the contractor or by increasing the height of the upstream edge of the partially completed embankment of the permanent dam, such requirement went beyond the provision of the specifications imposing on the contractor the obligation to take certain protective and control measures to divert and care for the stream during construction and therefore constituted a change, entitling the contractor to an equitable adjustment. However, Government instructions to avert the threat of flood damage or to discharge other contractual obligations, apart from the change in storage requirements, did not constitute a change, entitling the contractor to an equitable adjustment.

When the provisions of the specifications of a contract require the contractor to store inflow into a reservoir to a certain elevation and to provide temporary control works which should be capable of releasing water up to 250 cubic feet per second in the event permanent outlet works are not completed by a certain date, such works must be capable of passing 250 cubic feet per second during the whole irrigation season and not merely when the works were first constructed and water was released through them, since the need for water during the irrigation season is a continuing one. However, the contractor is entitled to an equitable adjustment if its costs were increased by failure of the Government to require a larger opening in the intake structure at the time when it was being built.

Appeal of Inter-City Sand and Gravel Co. and John Kovtynovich, IBCA-128 (May 29, 1959) 66 I. D. 179

A railroad construction contractor who was to rehabilitate mileage of The Alaska Railroad and, in so doing, was required by the terms of the specifications to effect two separate track lifts totaling six inches with new crushed ballast from a pit located at Spencer, Alaska, did not satisfy the requirement for one of these lifts when in the course of replacing and respacing the ties it gave the track an initial or out-of-face lift, and tamped the old ballast to achieve a sound road bed for the replaced and respaced ties, even though when the track was lowered back to the road bed it may have been higher than before the commencement of the operations. As the out-of-face lift was either work that necessarily had to be performed to carry out the purposes of the contract, or was performed for the convenience of the contractor, it cannot qualify as extra work entitling the contractor to additional compensation. There was also nothing in the correspondence and negotiations relating to the approval by the contracting officer of the contractor's progress schedule which could be said to have effected a practical

CONTRACTS--Continued

INTERPRETATION--Continued

interpretation of the requirements of the specifications with respect to the track lifting operations inconsistent with their literal terms.

Appeal of William A. Smith Contracting Company, Inc., IBCA-83 (Jun. 16, 1959) 66 I. D. 233

Under a contract which provided for the sale of scrap iron and steel by The Alaska Railroad to a purchaser contemplating its export from Alaska, and which also provided that the scrap was to be sold "F.O.B. Cars, The Alaska Railroad, Anchorage or Seward, Alaska," and that the purchaser was to arrange for berthing of ship, wharfage and handling at dockside, the railroad, when the purchaser elected to take delivery at Seward, Alaska, where the railroad owned the dock, was obligated only to effect delivery of the scrap in the general receiving yards of the railroad at Seward, and the purchaser was obligated to pay wharfage, unloading, switching, and other terminal charges under the applicable tariffs of the railroad.

Appeal of Commercial Metals Company, IBCA-99 (Aug. 27, 1959) 66 I. D. 298

An ambiguity in specifications and drawings prepared by the Government will be resolved in favor of the construction contended for by it where there is no showing that the contractor actually and reasonably relied upon a different construction or that the Government had a conscious design to write a different construction into the contract, and where the specifications and drawings lend more support to the Government's construction than to the one contended for by the contractor.

Appeal of Flora Construction Company, IBCA-101 (Sept. 4, 1959) 66 I. D. 315

Under a contract providing for the installation and leasing by the contractor of an FM radio communications system in the Great Smoky Mountains National Park, the contractor is entitled to rental payments on a 12-month basis for the operation of three repeater stations incorporated by it in the bid schedule, notwithstanding the fact that the repeater stations were subsumed under a general provision of the schedule calling for operation of the relevant control points on a 5-month basis, when it appears that (1) the specifications contemplated that bidders could modify the bid schedule; (2) the communication system would not function without the operation of the repeater stations all 12 months of the year; and (3) this was made clear by a technical proposal accompanying the bid, together with an explanatory covering letter, which was accepted by the contracting officer as part of the contract.

Appeal of Land-Air, Inc., IBCA-192 (Nov. 30, 1959) 66 I. D. 402

CONTRACTS--Continued

MODIFICATION

Where the acceptance of a change order by the contractor represents a unilateral mistake on his part, administrative relief may not be had, since it is well-settled that the reformation of contracts is a judicial rather than an administrative function.

Appeal of Sam Bergesen, IBCA-11 (Aug. 1, 1955) 62 I. D. 295

A contractor was engaged in stringing operations while constructing a transmission line under a contract which required the reels of conductor to be furnished by the Government. After stringing operations had commenced, the contractor discovered that many of the reels were defectively wound, and that this condition necessitated stops in its operations for the purpose of disentangling individual wraps of the conductor and of cutting off tails. The contractor filed a claim for additional compensation for performing this work, and a change order, which provided additional compensation and which was accepted by the contractor, was entered. Subsequently, the contractor filed an additional claim based on a general slow-down of its operations, as distinguished from the complete stoppages of its operations involved in the repair or adjustment of the defectively reeled conductor. The slow-down claim also included an element based on "over-inspection" of the contractor's operations. The slow-down claim must be rejected when the evidence shows that the contractor operated too fast rather than too slow, and that this method of operation rather than the condition of the conductor or over-inspection was responsible for the difficulties.

Appeals of Tyee Construction Company and Parker-Schram Company, IBCA-112 and IBCA-113 (Apr. 30, 1958)

A request of a roadway contractor for reconsideration of a borrow claim, which is based on the contention that the Board could not give effect to deviations from the "changes" and "changed conditions" clauses of the U. S. standard form of construction contract that limited the applicability of these clauses because deviations were prohibited by the regulations relative to public contracts, must be denied. Such regulations are simply for the protection of the Government against its own officers, and hence may not be enforced against the Government by a contractor seeking to avoid the obligation of its contract. Moreover, although the courts have declared the standard "changes" and "changed conditions" clauses to be paramount as against caveatory or exculpatory provisions in the specifications of a general nature, this is not equivalent to a prohibition upon deliberate deviations. The standard provisions are paramount as against inconsistent specifications

CONTRACTS--Continued

MODIFICATION--Continued

only in cases in which there is no other aid to interpretation than the provisions of the standard form itself.

Appeal of Morrison-Knudsen Company, Inc., IBCA-36 and IBCA-50 (Mar. 23, 1959) 66 I. D. 71

Acceptance by a contractor of a change order which stipulated that "the time necessary for the completion of the work" described in the order is a certain number of days and that "the contract time is extended accordingly" does not bar the allowance of a further extension on account of time lost because of the inability of the contractor to perform portions of the original contract work until the Government had removed, through the issuance of the order, an excusable cause of delay.

Appeal of James C. Christopher, d/b/a Christopher Construction Company, IBCA-109 (Mar. 31, 1959) 66 I. D. 117

NEGOTIATED CONTRACTS

Modification of language in provision for settling, by arbitration, disputes as to the character and amount of a readjusted franchise fee under concession contracts of the National Park Service which includes appropriate criteria for the guidance of the arbitrators in determining the amount and character of the fee.

Inclusion in Concession Contracts of Provision for Arbitration, M-36440 (June 3, 1957)

NOTICES

The appeal of a contractor from the decision of a contracting officer assessing liquidated damages against the contractor by reason of the late completion of the work under the contract must be dismissed when the contractor failed to give the contracting officer timely notice of the causes of the delay as required by article 9 of the contract. The consideration of the causes of delay by the contracting officer on the merits does not amount to a waiver of the requirement of notice, since the contracting officer could extend the time for giving notice only with the approval of the head of the Department.

Appeal of Campbell Construction & Equipment Co., IBCA-2 (Jan. 11, 1955) 62 I. D. 6

CONTRACTS--Continued

NOTICES--Continued

The appeal of a contractor from the decision of a contracting officer assessing liquidated damages against the contractor by reason of the late completion of the work cannot be considered on the merits when the contractor failed to give the contracting officer notice of the causes of the delay as required by Article 9 of the standard form of Government construction contract. The consideration of the causes of delay by the contracting officer on the merits does not amount to a waiver of the requirement of notice, since the contracting officer could extend the time for giving notice only with the approval of the head of the Department. Although the head of the Department had delegated to the heads of bureaus the authority to extend the time for giving notice, and had authorized them to redelegate the authority to their subordinates by order published in the Federal Register, no effective redelegation was accomplished in this case, since the Commissioner of Reclamation authorized his contracting officers to extend the time for giving notice by means of an unpublished instruction in the Bureau of Reclamation manual.

Appeal of S. J. Groves & Sons Company, IBCA-8 (April 12, 1955) 62 I. D. 145

The contractor was proceeding legally at its own risk in moving men and equipment to tracts of the right-of-way prior to the receipt of formal written notice that the tracts were available, and hence the Government was not liable for any damages which the contractor may have sustained as a result of its premature occupation of the tracts.

Appeal of Paul C. Helmick Co., IBCA-39 (July 31, 1956) 63 I. D. 209

Where a contract provided for an extension of time in case solid rock should be encountered by the contractor in the drilling of a well but also required immediate notice to be given to the contracting officer of the existence of any such condition, the failure of the contractor to comply with this procedural requirement bars consideration on the merits of a request for an extension of time. Even assuming that the procedural requirement could have been waived by the contracting officer, his mere silence cannot be construed as a waiver in the circumstances of this case.

Appeal of Carl W. Pistor, IBCA-81 (Dec. 27, 1956)

CONTRACTS--Continued

NOTICES--Continued

The Board of Contract Appeals will not reject a claim for an extension of the performance time of a contract because of want of proof that the contractor has complied with an applicable notice requirement of the contract if such requirement is one that is subject to waiver, and if no authorized representative of the Government has asserted that the contractor failed to give timely notice or has asked that compliance with the notice requirement be proved by the contractor.

Appeal of Central Wrecking Corporation, IBCA-69 (Mar. 29, 1957) 64 I. D. 145

When the contracting officer has considered claims on their merits, they are not barred by the failure of the contractor to comply with the procedural requirement of written notice of the claims, and the circumstance that the claims may have been considered by the contracting officer on the merits only as a matter of grace, may not be given any weight by the Board of Contract Appeals in assessing the merits of the claims on appeal.

Appeal of Caribbean Construction Corporation, IBCA-90 (June 28, 1957) 64 I. D. 254

When a contractor who was seeking an extension of time for the performance of a contract claimed that the cause of delay in completion was attributable to the conduct of an inspector who had died before the completion of the contract and that he had been dissuaded from notifying the contracting officer of the cause of the delay by the assurance of the inspector that he would be granted an extension of time, the Board will not disturb the decision of the contracting officer that an extension of time should be denied because of the failure of the contractor to give written notice of the cause of the delay in the absence of proof that the merits of the claim could still be ascertained and that the inspector gave the assurance claimed.

Appeal of Utility Construction Company, IBCA-149 and IBCA-161 (June 19, 1958) 65 I. D. 278

A claim of a contractor for an extension of time based on delay in securing performance and payment bonds, due to the unexpected liquidation of its bonding company, must be denied, even if it be assumed for the sake of argument that this event was unforeseeable, when it is wholly speculative whether the delay actually made any difference to the contractor.

CONTRACTS--Continued

NOTICES--Continued

Even if the contractor had been able to obtain the bonds sooner, it does not follow that it would necessarily have been given notice to proceed any earlier than it was given. Moreover, the contractor has not shown that it would have obtained a more favorable performance period if the delay had not occurred.

Appeal of Black Hills Ditching Co., Inc., IBCA-145 (Aug. 15, 1958) 65 I. D. 342

Where a contract requires notice within a specified period, but does not specify the manner in which notice is to be given, the mere mailing of notice is not sufficient unless it is received within the time specified.

Uranium Exploration Company of California, IA-913 (Aug. 26, 1958) 65 I. D. 365

A contracting officer is entitled to have contractors give him reasonable notice of readiness of the work for final inspection.

Appeal of Cox and Haddox, IBCA-155 (Mar. 26, 1959) 66 I. D. 97

Appeal will not be dismissed on motion in case of substantial compliance with notice requirement of "delays-damages" clause of the construction standard form.

Appeal of Studer Construction Company, IBCA-95 (Dec. 11, 1959) 66 I. D. 414

PAYMENTS

The Board must reject the contractor's claim that it is entitled to additional compensation for cutting the merchantable timber on the special tracts themselves. The contractor performed this work without making any effort to obtain an extra work order in writing as required by the contract and specifications. The performance of the work without obtaining an extra work order made it voluntary, and it has long been settled that a contractor is not entitled to additional compensation for voluntary work. The fact that partial payments were made during the progress of the work is also without signifi-

CONTRACTS--Continued

PAYMENTS--Continued

cance, since such payments were only provisional; nor did the performance of the work with knowledge of the Government inspectors improve the contractor's position. A contractor may have reasons of his own for undertaking work not required by the specifications, and the inspectors would not interfere with him unless the work affected the interests of the Government. If the presence of inspectors could validate work undertaken without a written extra work order, the requirement that such an order be obtained would be rendered nugatory, since Government inspectors are always present at the sites of the work. Furthermore, the contractor has failed to show convincingly that the so-called merchantable timber cut from the special tracts was in fact merchantable. Since the definition of merchantability in the specifications was rather vague, the parties solved this problem practically by arranging to have the merchantable trees marked with yellow paint. The evidence does not warrant the conclusion, however, that the trees were so marked.

When in the course of clearing the right-of-way a forest fire occurred, the contractor was required under the applicable specifications to make every reasonable effort to suppress the fire, and hence is not entitled to additional compensation to cover its costs of suppressing the fire. It is immaterial that the fire may not have been caused by its operations, and that orders to suppress the fire were issued to the contractor by the contracting officer upon request of the United States Forest Service. If the fire was caused by the contractor's operations, it was liable, moreover, to pay to the Forest Service its costs of suppressing the fire, and damages for injury to National forest lands, and the contracting officer was justified in withholding from payments due to the contractor an amount sufficient to cover this contingent liability. Although the contracting officer has found that the fire was caused by the contractor's operations, and is liable to the Forest Service for its costs and damages, his finding is a mere conclusion wholly unsupported by the evidentiary facts, and he is directed to revise his finding to remedy this defect.

Appeal of Paul C. Helmick Co., IBCA-39
(July 31, 1956) 63 I. D. 209

A claim of nonpayment for overhaul of material from a borrow area must be denied when Government records show that payment was made, and the contractor has failed to produce satisfactory proof to the contrary.

Appeal of McWaters and Bartlett, IBCA-56
(Oct. 31, 1956)

CONTRACTS--Continued

PAYMENTS--Continued

When a contracting officer withheld from payments due under a contract sums to cover contingent liabilities of a contractor by reason of alleged labor violations being investigated by him and by the Department of Labor, but made no findings of fact with respect to the alleged labor violations and merely informed the contractor that the matter was being referred to the Comptroller General, and when the contractor never requested the contracting officer to make findings of fact with respect to the alleged labor violations and did not complain of the withholding in its notice of appeal, but only in a subsequent brief, neither the issue of the alleged labor violations nor the propriety of the withholding is properly before the Board of Contract Appeals. The submission of the matter to the Comptroller General did not constitute a finding of fact or decision within the meaning of the "disputes" article of the contract, or of the regulations of the Board.

Appeal of Tri-State Construction Co., IBCA-63
(Feb. 26, 1957) 64 I. D. 38

Under a unit-price contract for the excavation of borrow material where the Government fails to comply with the measurement provisions of the contract, and where compliance subsequently becomes impossible, payment for the excavated material is to be made on that basis which is most consistent with the provisions of the contract and the available data of a reliable nature as to the quantities excavated.

Appeal of Larsen-Meyer Construction Co.,
IBCA-85 (Nov. 24, 1958) 65 I. D. 463

Under specifications which provided that the contractor furnish and install in a compacted state gravel bedding for a concrete lining in an irrigation lateral and that the gravel bedding so installed should be measured for payment in the most practicable manner, either to the outlines of the areas covered with gravel bedding and to an average thickness, or in approved vehicles at the point of delivery, the contracting officer had a choice between these two alternative methods of measuring the gravel bedding for payment. Whichever method was chosen, however, payment would have to be made for the gravel in a compacted state, and, if payment were based on loose truck measurements of the gravel, a compaction factor would have to be applied to the gravel so measured. It is apparent that if either method of measuring the gravel for payment presupposed its measurement in a compacted state, the other method must also presuppose this, since both methods, to be equitable must produce equivalent results. The fact that bidders were unable to determine the

CONTRACTS--Continued

PAYMENTS--Continued

factor of compaction in advance, since the source of the gravel was subject to the approval of the contracting officer, proves no more than that the contract involved elements of uncertainty or risk for the contractor. Differences of nomenclature to be found in various items of the schedule and specifications with respect to payment do not demonstrate an ambiguity in the provisions for payment of the gravel bedding, since the language was not exactly parallel and the provisions for the performance of the various items differed substantially. The fact that Government inspectors kept a truck count tally of the gravel bedding is not a practical construction requiring payment for the gravel by loose truck measurement, since they reported generally all operations under the contract; the information was useful for other purposes, such as the making of progress payments; and the contracting officer was not bound to determine how the gravel should be paid for until after it had been placed. The contracting officer did not abuse his discretion in paying for the gravel bedding on the basis of cross sections taken prior to the placing thereof, since the record shows that the practice of using cross sections in measuring earthwork for payment is common, and the contractor has failed to bear the burden of proving that there were circumstances that made the use of the cross sections unfair.

Appeal of Glenn Dusky, IBCA-130 (Dec. 11, 1958) 65 I. D. 489

A claim of a contractor for additional compensation on account of monetary losses allegedly resulting from a failure of the Government to make monthly progress payments as provided by the contract is based on a breach of contract, and may not be administratively determined under a standard-form construction contract.

Appeal of J. W. Merz, IBCA-64 (Mar. 10, 1959)

A railroad construction contractor who in connection with the rehabilitation of The Alaska Railroad was required to load, haul, and place ballast is entitled to additional payment therefor when it was misled by the specifications into believing that each carload of ballast would contain 42 cubic yards of ballast but the preponderance of the evidence shows that each car actually contained 48 cubic yards of ballast, notwithstanding that the foreman in charge of the contractor's ballast trains had certified in the course of the loading that each car contained 42 cubic yards of ballast, and the contractor's chief officer had not immediately challenged the erroneous certifications, since he did not learn the truth until after the loading of the ballast had

CONTRACTS--Continued

PAYMENTS--Continued

been proceeding for a considerable time, and it was necessary to verify the capacity of the cars by checking with their manufacturer.

Appeal of William A. Smith Contracting Company, Inc., IBCA-83 (Jun. 16, 1959) 66 I. D. 233

Under a contract providing for the installation and leasing by the contractor of an FM radio communications system in the Great Smoky Mountains National Park, the contractor is entitled to rental payments on a 12-month basis for the operation of three repeater stations incorporated by it in the bid schedule, notwithstanding the fact that the repeater stations were subsumed under a general provision of the schedule calling for operation of the relevant control points on a 5-month basis, when it appears that (1) the specifications contemplated that bidders could modify the bid schedule; (2) the communication system would not function without the operation of the repeater stations all 12 months of the year; and (3) this was made clear by a technical proposal accompanying the bid, together with an explanatory covering letter, which was accepted by the contracting officer as part of the contract.

Appeal of Land-Air, Inc., IBCA-192 (Nov. 30, 1959) 66 I. D. 402

PERFORMANCE

A Project Engineer assigned to supervise the construction of a sewer does not transcend his proper function when he assists the contractor in making the necessary preparations and computations in the laying out of the sewer after it has been discovered that the original plans for the sewer were erroneous.

Appeal of Art Pugsley, D/B/A Art Pugsley Construction Co., IBCA-5 (Feb. 25, 1955) 62 I. D. 54

A contractor who bids on a Government contract is charged with the obligation of having available whatever machinery and labor may be necessary to execute the contract, and the burden of proving that delays were excusable rests upon the contractor who has taken an appeal.

CONTRACTS--Continued

PERFORMANCE--Continued

When bids on a contract were opened on June 26, 1950, a day after the commencement of the Korean conflict, and the contract was awarded on June 29, 1950, four days later, even though the contractor was already bound by its bid when the conflict commenced, and the proportions and probable duration of the conflict were not then entirely manifest, the contractor was at least put on notice at the very beginning of the performance of the contract that difficulties in procuring labor equipment might be expected, and that early and determined efforts would be necessary if shortages were to be avoided.

Appeal of S. J. Groves & Sons Company, IBCA-8 (April 12, 1955) 62 I. D. 145

When the specifications limited the application of an escalation clause to the period from bidding to shipment, the contractor is not entitled to the benefit of the clause beyond the period when shipment was due, even though after installation of the pumps it was found that adjustments were necessary.

Appeal of the Pelton Water Wheel Company and Byron Jackson Company, IBCA-16 (Oct. 12, 1955) 62 I. D. 385

Where the specifications for the construction of a high school required that the building be constructed entirely of various types of steel and aluminum panels manufactured by the Detroit Steel Products Company, except for the foundations and structural steel, and that the manufacturer or his authorized representative erect the panels, the contractor is not entitled to additional compensation for work undertaken to correct leaks which appeared in the building after the installation of the wall and roof panels when the evidence shows that the panels were erected by a subcontractor not authorized by the Detroit Steel Products Company, and the instructions of the manufacturer for the erection of the panels were not followed in a considerable number of respects. The contractor has the burden of proving that the panels could not produce a weather-tight building, even if the instructions of the manufacturer had been followed in their entirety.

Appeals of Carson Construction Company, IBCA-21, IBCA-25, IBCA-28, IBCA-34 (Nov. 22, 1955) 62 I. D. 422

The Board must reject the contractor's claim that it is entitled to additional compensation for cutting the merchantable timber on the special tracts themselves. The contractor performed this work without making any effort to obtain an extra work order in writing as required by the contract and specifications. The performance of the work without obtaining an extra work order made it voluntary, and it has long been settled that a contractor is not entitled to additional compensation for voluntary work. The fact that partial payments were made during the progress of the work is also without significance, since such payments were only provisional; nor did the performance of the work with knowledge of the Government inspectors improve the contractor's position. A contractor may have reasons of his own for undertaking work not required by the specifications, and the inspectors would not interfere with him unless the work affected the interests of the Government. If the presence of inspectors could validate work undertaken without a written extra work order, the requirement that such an order be obtained would be rendered nugatory, since Government inspectors are always present at the sites of the work. Furthermore, the contractor has failed to show convincingly that the so-called merchantable timber cut from the special tracts was in fact merchantable. Since the definition of merchantability in the specifications was rather vague, the parties solved this problem practically by arranging to have the merchantable trees marked with yellow paint. The evidence does not warrant the conclusion, however, that the trees were so marked.

Appeal of Paul C. Helmick Co., IBCA-39 (July 31, 1956) 63 I. D. 209

The test for determining whether the work under a Government contract has been completed, within the intent of provisions imposing liquidated damages for failure to complete the work by a prescribed date, is not whether every jot and tittle of the work has been done, but whether the contractor has substantially performed the work required by the contract. Evidence that the job of building a particular structure has been substantially completed may be found in the relative inconsequentiality, both as to character and amount, of the work remaining to be done; in the successful use of the structure for its intended purpose, notwithstanding some uncorrected defects; and in the expert opinions of the chiefs of the engineering and administrative services of the bureau that made the contract and supervised its administration to the effect that the contract work had been substantially completed.

Appeal of Urban Plumbing and Heating Company, IBCA-43 (Nov. 21, 1956) 63 I. D. 381

PERFORMANCE --Continued

The total deletion by the Government of an item providing for a select borrow surface course in a contract for the construction of Section "G" of the Richardson Highway in Alaska entitles the contractor to an equitable adjustment under the "changes" article of the contract when the item was deleted because of insufficiency of funds rather than to meet unanticipated field conditions, provided that the contractor has demonstrated a relation of cause and effect between the deletion of the item and the consequences attributed thereto. The contractor is entitled to an equitable adjustment for preparatory work on a specialized plant designed to produce the select borrow material economically but not for another plant which was either not acquired for the sole purpose of performing the deleted item or which was abandoned as the instrument for the performance of the item long before its deletion. On the other hand, the contractor is not entitled to any equitable adjustment by reason of difficulties encountered in finishing the subgrade when such difficulties were due to its own haste and inadequacies in finishing the subgrade prior to the deletion of the surfacing course, or by reason of the prolongation of the work into another operating season when this was due to the same cause, and to the failure of the contractor to give timely notice of completion prior to the onset of winter weather. A highway contractor may not maintain high-salaried employees and equipment during the winter to complete work that had been virtually completed at the close of the prior working season for fear that the Government might require excessive repairs of winter maintenance when such fear proved groundless. In any event, a claim that the failure of the Government to perform its obligations under a contract resulted in the prolongation of the work into another season is a claim for unliquidated damages that may not be administratively settled or allowed.

Appeals of Morrison-Knudsen Company, Inc., IBCA-36 and IBCA-50 (May 27, 1957)
64 I. D. 185

A contract for the erection of several comfort stations may be considered as substantially complete, within the meaning of the rule of law that precludes the assessment of liquidated damages for periods after the contract work is substantially complete, notwithstanding that at one of the comfort stations minor items of corrective work remain to be done and a few of the toilet fixtures remain to be installed, if the evidence establishes that these deficiencies are not such as to impair materially the useability of the station.

Appeal of Elmer A. Roman, IBCA-57 (June 28, 1957)

CONTRACTS--Continued

PERFORMANCE --Continued

A contractor engaged in rehabilitating an existing irrigation system should expect that some maintenance work and even minor construction work will be performed during the construction period of the contract, and the fact that such work was performed does not excuse the contractor from repairing damage caused by flood waters resulting from an unusually heavy rainstorm. This is especially so when the contractor has failed to show that there was a causal connection between such work and the damage to the contractor's work.

In order to permit inspection of damage caused by a flood resulting from an unusually heavy rainstorm a contractor could be required to dewater a headworks structure inundated by the flood waters when the contract provided that the contractor was to provide without cost to the Government reasonable facilities for the inspection of the work.

The question whether a contractor who was engaged in the rehabilitation of an existing irrigation system may be required to repair storm damage to the work outside the pay or neat lines of the contract depends in large part upon whether the contractor was negligent in its operations prior to the occurrence of the storm. Although under the terms of the contract the contractor was required to repair the storm damage irrespective of fault on its part, this obligation would be limited to the restoration of the work it had undertaken under the contract. On the other hand, if the contractor were guilty of negligence in the conduct of its operations prior to the storm, it would be obligated to repair any damage attributable to its negligence, whether within or without the pay or neat lines. However, even though the contractor were not negligent, the scope of its obligation to repair storm damage would not be so narrow that it could not be required to do any work that was outside the pay or neat lines, nor so wide that it could be required to restore any property of the Government that may have been damaged by the storm. Thus, the contractor, who was required to make an opening through an embankment, was not obligated to rebuild other portions of it, irrespective of the relationship of this work to the restoration of the area excavated by the contractor or to the completion of other features of the contract work.

A contractor who was entirely cooperative, and who would have provided additional works to protect its operations in rehabilitating an existing irrigation system, if such works had been clearly demanded or even suggested by project personnel, cannot be held to have been negligent in the conduct of its operations when a storm occurred that proved to be of such magnitude that its consequences could hardly be said to have been foreseeable either by the contractor or by project personnel. The burden

of proving that the contractor was negligent rests on the Government in such circumstances, and this burden cannot be sustained simply by showing failure on the part of the contractor to coordinate effectively the work of its subcontractors, so that they would perform the subcontracts on time, if the prime contractor did not breach its obligation of timely performance towards the Government, nor by showing that the prime contractor performed other acts in the course of construction which may not have been causative factors in magnifying the damage caused by the storm. However, the contractor was guilty of negligence when, having completed a wasteway structure, he failed to place the backfill above the structure for a period of approximately 6 months prior to the storm, since such neglect would expose the structure to damage even in an ordinary rainy season.

Appeal of Barnard-Curtiss Company, 1BCA-82 (Aug. 9, 1957) 64 I. D. 312

The existence of an error in calculating an estimated quantity of excavation and of a further unexplained discrepancy between the estimated quantity of excavation and the actual excavation does not in itself establish that a contracting officer was wrong in finding and concluding that the contractor could have made a sufficiently accurate calculation of the probable amount of the excavation by utilizing information supplied by the drawings and specifications, and that, in view of the approximate quantities provision included in the specifications, additional compensation could not be allowed by reason of a substantial underrun below the estimated quantity.

Appeal of the Diamond Engineering Company, 1BCA-93 (Dec. 20, 1957)

A claim for additional compensation made by a tunneling contractor on the ground that it was compelled to excavate two inches below the spring lines of the tunnels throughout their lengths in order to provide space for installing steel lagging outside the steel ribs must be rejected when the contractor was paid, in accordance with the provisions of the specifications, for such additional excavation in the reaches of the tunnels as was necessary to permit the installation of steel lagging, and the installation of steel lagging was wholly unnecessary in other long reaches of the tunnels.

Appeal of J. A. Terteling & Sons, Inc., 1BCA-27 (Dec. 31, 1957) 64 I. D. 466

A contractor engaged in the construction of a helium plant, who was expressly required by the terms of the specifications to make "every reasonable effort" to safeguard the plans for the plant and to assure that its employees were loyal Americans, was impliedly required to bear the cost of a security check of its employees to be made by an outside investigative agency.

Appeal of Quaker Valley Constructors, Inc., 1BCA-89 (Jan. 31, 1958) 65 I. D. 53

A contractor was engaged in stringing operations while constructing a transmission line under a contract which required the reels of conductor to be furnished by the Government. After stringing operations had commenced, the contractor discovered that many of the reels were defectively wound, and that this condition necessitated stops in its operations for the purpose of disentangling individual wraps of the conductor and of cutting off tails. The contractor filed a claim for additional compensation for performing this work, and a change order, which provided additional compensation and which was accepted by the contractor, was entered. Subsequently, the contractor filed an additional claim based on a general slow-down of its operations, as distinguished from the complete stoppages of its operations involved in the repair or adjustment of the defectively reeled conductor. The slow-down claim also included an element based on "over-inspection" of the contractor's operations. The slow-down claim must be rejected when the evidence shows that the contractor operated too fast rather than too slow, and that this method of operation rather than the condition of the conductor or over-inspection was responsible for the difficulties.

Appeals of Tyee Construction Company and Parker-Schram Company, 1BCA-112 and 1BCA-113 (Apr. 30, 1958)

Notwithstanding the occurrence of a storm which constituted "unusually severe weather" within the meaning of the delays-damages provision of the contract, and which damaged the excavation work of the contractor, it was not entitled to an extension of time for restoring the excavation when during the period when the restoration could have been accomplished, it could have made no progress due to its failure to have delivered to the job site the main anchor beam and erector anchor bar without which concrete could not have been poured. To be entitled to an extension of time the contractor must show not only that an excusable cause of delay occurred

CONTRACTS--Continued

PERFORMANCE--Continued

but also that it was a factor in the ultimate delay in the completion of the work. The contractor is entitled, however, to an extension of time for 2 days which were required by the contractor to do the extra concrete and form work necessitated by the storm, notwithstanding shortcomings in the concrete work that had to be remedied, since it would undoubtedly have completed all of the concrete work 2 days earlier if the storm had not occurred.

Appeal of Younger Bros., Inc., IBCA-148 (May 28, 1958) 65 I. D. 238

Claims of a contractor engaged in the construction of two substations for the Bonneville Power Administration based on charges of misconduct of the inspectors in supervising the work must be rejected when (1) the evidence in support of the claims is extremely stale; (2) the contractor in appealing has not requested a hearing at which the witnesses with knowledge of the events could be heard and subjected to cross-examination; (3) the top officials of Bonneville who were aware of the contractor's charges visited the site of the work for the purpose of investigating the charges, and after investigation found them to be groundless; (4) there is independent evidence of the good character and competence of the inspectors; (5) there were numerous shortcomings in the performance of the contractor's work that might have motivated his countercharges; (6) the charges are based on misunderstandings of the situations from which they arose; and, finally, (7) the charges run counter to inherent probabilities and are otherwise not credible.

The claim of a contractor engaged in the construction of substations for the Bonneville Power Administration that he was obliged to incur expenses for overtime by reason of an order of the contracting officer to accelerate the work must be rejected when it appears that the contractor was greatly behind in his work at that time; that the contracting officer had the express right under the specifications to direct that the contractor's work force be increased when a satisfactory rate of progress was not being maintained; and that the contracting officer merely authorized the overtime work. Although the contractor had prior thereto requested an extension of time, and the contracting officer had failed to act on the request, the contractor cannot be said to have been prejudiced when the request was not made at the time the delays occurred; the contractor did not demur against the contracting officer's inaction, and the contracting officer, after virtually granting the contractor's request at the time the work was ordered to be accelerated, finally granted an adequate extension of time.

Appeal of W & W Company, IBCA-54 (Aug. 4, 1958)

CONTRACTS--Continued

PERFORMANCE--Continued

A contractor who is entitled to an extension of time for performance by reason of such an unforeseeable cause as "unusually severe weather" is nonetheless entitled to such relief, despite the fact that its progress schedule, which it was required by the specifications to furnish to the Government merely for the latter's information, may have indicated that no work was originally scheduled during part of the period when the unusually severe weather occurred.

A claim of a contractor for an extension of time based on delay in securing performance and payment bonds, due to the unexpected liquidation of its bonding company, must be denied, even if it be assumed for the sake of argument that this event was unforeseeable, when it is wholly speculative whether the delay actually made any difference to the contractor. Even if the contractor had been able to obtain the bonds sooner, it does not follow that it would necessarily have been given notice to proceed any earlier than it was given. Moreover, the contractor has not shown that it would have obtained a more favorable performance period if the delay had not occurred.

A contractor is not entitled to an extension of time for performance on the ground that the Government required the installation of a different type of pump than that designated in the specifications when there is no showing that either type of pump, the delivery of which would have required from 60 to 90 days, would have arrived on the job at the time of its contemplated installation.

Appeal of Black Hills Ditching Co., Inc., IBCA-145 (Aug. 15, 1958) 65 I. D. 342

Under a unit-price contract for the excavation of borrow material where the Government fails to comply with the measurement provisions of the contract, and where compliance subsequently becomes impossible, payment for the excavated material is to be made on that basis which is most consistent with the provisions of the contract and the available data of a reliable nature as to the quantities excavated.

Appeal of Larsen-Meyer Construction Co., IBCA-85 (Nov. 24, 1958) 65 I. D. 463

Whatever may be the general scope of a provision in the specifications, empowering the contracting officer to suspend the work when conditions were "unfavorable for the prosecution of the work," it is clear that it cannot be held to extend to a situation that was foreseeable in view of other provisions of the specifications, which

CONTRACTS--Continued

PERFORMANCE--Continued

warned the contractor of the very same conditions and extended the time of performance by reason thereof.

Appeal of Reid Contracting Company, Inc., IBCA-74 (Dec. 19, 1958) 65 I. D. 500

A claim for additional compensation made by a tunneling contractor, who encountered volcanic tuff breccia rather than andesite rock which it expected, must be rejected, even if it be assumed that the tuff breccia material constituted a "changed condition" within the meaning of that clause in the standard form of Government construction contract, when the contractor is unable to prove that such material actually increased the difficulties of excavation and its costs. Such a conclusion must be reached when the record shows that normally tuff breccia is as easy to work in as andesite rock, and that the contractor's difficulties may have been largely due to its lack of experienced employees with the requisite know-how for dealing with the problems encountered and its employment of experimental methods and equipment which may have impeded the work.

Appeal of George A. Lord and William T. Lord, Partners, d/b/a Lord Bros. Contractors, IBCA-125 (Feb. 16, 1959) 66 I. D. 34

The provision in the standard-form construction contract that the contractor shall at his own expense "obtain all licenses and permits required for the prosecution of the work" does not impose upon a contractor, whose undertakings include installing sanitary plumbing on Government property and connecting such plumbing with a county sewer, the responsibility for paying a charge assessed by the county for the use to be made of the sewer by the Government, nor for solving the impasse created by a conflict between the plumbing specifications of the contract and the county plumbing code. Refusal by the county to issue a permit for the connection save upon condition that such charge be paid and that the specifications be altered to conform to such code constitutes an excusable cause of delay under the standard-form "delays-damages" clause.

Appeal of James C. Christopher, d/b/a Christopher Construction Company, IBCA-109 (Mar. 31, 1959) 66 I. D. 117

PROTESTS

A contracting officer waives the requirement of timely protest by considering a claim on the merits.

Appeal of Jack Willson, IBCA-7 (June 14, 1955) 62 I. D. 225

CONTRACTS--Continued

PROTESTS--Continued

Although the Board has held that a contracting officer cannot invoke the requirement of timely protest if he has considered a claim on the merits, the consideration of the merits must involve a question of fact, or at least a mixed question of law and fact that is disputed. Since in the present case the contracting officer merely held that the claims could not be allowed in view of the approximate quantities provision of the specifications, which was an expression of an opinion on a question of law, he was not barred from denying the claims merely for failure to make timely protest.

Appeal of R. P. Shea Company, IBCA-37 (Nov. 30, 1955) 62 I. D. 456

Claims for additional compensation arising out of the construction of the Fort Clark Unit of the Missouri River Basin Project must be rejected, when the claims are either based on alleged extra work which was required by the specifications, or the claims are for unliquidated damages not cognizable by the Board, or the contractor failed to protest against the alleged extra work as required by the specifications.

Appeal of Korshoj Construction Co., Inc., IBCA-9 (May 2, 1956) 63 I. D. 129

A waiver of the failure of a contractor to comply with the provisions of the specifications relating to protest cannot appropriately be implied when the contracting officer considered some aspects of the merits of the claim only because he was under the impression that the claim had been withdrawn.

Appeal of J. D. Armstrong Company, Inc., IBCA-40 (Aug. 17, 1956) 63 I. D. 289

Where the specifications require that the contractor file a timely written protest against any work that he considers to fall outside the requirements of the contract or against any ruling that he considers to be unfair, the failure of the contractor to comply with the requirement bars the consideration on the merits of any claims not so protested unless such failure is waived.

Appeal of McWaters and Bartlett, IBCA-56 (Oct. 31, 1956)

CONTRACTS--Continued

PROTESTS--Continued

When a contracting officer has invoked the protest requirements of the specifications as a bar to the allowance of a contractor's claims, although he has also commented unfavorably on the merits of the claims, and the contractor has failed either to comply with protest requirements of the specifications or to present any argument or circumstance justifying a waiver of such requirements, its claim for additional compensation because of alleged additional work must be denied.

Appeal of R. V. Lloyd & Company, IBCA-143 (Feb. 12, 1958)

The damage claims of a contractor engaged in the construction of substations for the Bonneville Power Administration based on alleged orders of inspectors to perform work in excess of, or contrary to the requirements of the specifications, must be rejected when the claims are not supported by credible evidence and the contractor did not protest to the inspectors' superiors at the time such work was performed, and request them to determine whether the orders of the inspectors were arbitrary and unreasonable.

Appeal of W & W Company, IBCA-54 (Aug. 4, 1958)

RELEASE

It is well settled that the failure to except an item from settlement has the effect of barring any claim based on such item, and, therefore, a contractor who, in executing a release on the contract, requested an extension of time of a certain number of days for the completion of the work under the contract, cannot subsequently increase its request to a greater number of days, in order to avoid the assessment of liquidated damages.

Appeal of S. J. Groves & Sons Company, IBCA-8 (April 12, 1955) 62 I. D. 145

Where a change order for extra work is issued, to which the contractor has agreed, and the contractor has been paid the additional compensation provided in the change order, a claim for such compensation must be denied.

Appeal of Fischbach and Moore, IBCA-26 (July 25, 1955)

CONTRACTS--Continued

RELEASE--Continued

As a release on contract given by a contractor should be liberally construed, the claim excepted in the release may be maintained, although based on a legal theory not mentioned therein. To construe the release liberally is not tantamount to a reformation thereof.

Appeal of L. D. Shilling Company, Inc., IBCA-23 (Aug. 19, 1955)

As releases obtained by the Government by means of the exertion of economic duress have been treated as unilateral decisions of the contracting officer that are subject to appeal under the disputes clause of Government construction contracts, a release which should not have been accepted by the Government may similarly be treated as the unilateral act of the contractor and may be disregarded by the administrative reviewing authority on appeal. Although such an authority may not reform contractual instruments, the disregard of the release under such circumstances does not constitute an affirmative act of reformation.

A claim for additional compensation for repairing leaks in pipes under a contract which involved the construction of pipelines may be allowed notwithstanding the execution by the contractor of a release of claims arising out of such repairs when the contractor erroneously understated the number of the leaks repaired and the Government in accepting the release had knowledge of circumstances which should have put it on notice that the amount of the claim reserved in the release was so low as to indicate that the contractor was making a mistake and that its acceptance would, therefore, be inequitable.

Appeal of United Concrete Pipe Corporation, IBCA-42 (May 31, 1956) 63 I. D. 153

Acceptance by a contractor of a change order which stipulates that no increase in the contract performance time will be allowed "on account of the performance" of the work described in the order does not bar the allowance of an extension of time on account of delays caused by the action of the Government in holding up the job while the advisability of ordering such a change was being considered.

Appeal of Chas. I. Cunningham Co., IBCA-60 (Dec. 6, 1957) 64 I. D. 449

CONTRACTS--Continued

SPECIFICATIONS

Where a contractor is permitted by the contracting officer upon his request to vary the sequence of placing concrete, the contractor is not entitled to additional compensation for increased labor costs in cleaning and roughening construction joints, since the contractor was clearly at fault in failing to protect the joint surfaces adequately, and the terms of the specifications expressly excluded the payment of additional compensation "by reason of any limitation in the placing of concrete."

Appeal of Lowdermilk Brothers, IBCA-10 (Feb. 11, 1955)

A contractor who was required to lenthen and reconstruct a bridge in accordance with unit prices stipulated in a schedule for erecting salvaged timber in structures, removing timber in existing structures, and salvaging timber, was not entitled to additional compensation for removing the center span of the existing bridge prior to the construction of the center pile bent for the lengthened bridge, and replacing the center span in its original position, when the removal of the center span was a necessary operation in reconstructing the bridge, and no provision for payment for this work was contemplated by the contract.

Where a contract provided for the excavation of a particular section of a channel in accordance with specifications and drawings, and the requirements of the work were reasonably ascertainable from the drawings relating to that section of the canal and a related drawing, which showed that there was much more material on one side of the centerline of the channel than on the other side, and that the embankments were designed to be approximately equal and to contain a water flow of 4,000 c.f.s., which would require the embankments to be a minimum height of 18 feet above the bottom grade of the channel, if allowance was also to be made for a freeboard, the contractor is not entitled to additional compensation for equalizing the embankments to the necessary minimum height, notwithstanding the omission of the 18-foot dimension on one of the drawings, and its revision by the contracting officer to show the omitted dimension, at a time when the contractor had virtually completed the excavation work on that section of the canal.

Appeal of A. G. McKinnon, d/b/a McKinnon Construction Co., IBCA-4 (April 25, 1955) 62 I. D. 164

CONTRACTS--Continued

SPECIFICATIONS--Continued

When ambiguity of a phrase in the specifications was due to its position in the sentence and such ambiguity was clarified by other provisions in the same paragraph and by information received by the contractor from the contracting officer prior to the submission of the bid, a claim for extra work based on the phrase should be rejected.

When, under specifications prescribing in detail the manner in which plaster work was to be performed, and expressly requiring plaster to be 3/4 of an inch thick, the contractor was required to apply plaster exceeding twice the specified thickness in a considerable area, and to do an excessive amount of shimming, the contractor was entitled to an equitable adjustment for the extra work.

Appeal of Jack Willson, IBCA-7 (June 14, 1955) 62 I. D. 225

Although the specifications provided that in case of difference between small and large scale drawings, the larger scale drawings shall take precedence, there was no such difference when the drawings did not relate to the same details. Thus the contractor cannot rely upon a large scale drawing indicating the elevations of the bottom of the column footings from which it determined the amount of backfill required when the alleged smaller scale drawings were not drawings of the large scale details.

Appeal of Johnson Construction and Maintenance Company, IBCA-15 (Oct. 28, 1955)

A contractor is not entitled to additional compensation for providing ventilating outlets in the concrete floor of the auditorium of a high school as part of the ventilating system even though the auditorium floor seating, which was an alternate in the bidding, was temporarily eliminated, and the specifications may not have provided all the details for the outlets, since openings were required by the specifications to be constructed as part of the ventilating system, which had not been eliminated, and the specifications also permitted the contracting officer to supply such detailed drawings as might be necessary.

Where the plans and specifications for the construction of footings for a high school gave the results of subsurface investigations and indicated the depth of the footings, which were to be keyed in solid rock, to be 1 foot 6 inches, but also contained language that indicated uncertainty in the plans, and that the rock lines shown on the plans were "approximate", the

CONTRACTS--Continued

SPECIFICATIONS--Continued

depth of the footings cannot be regarded as definite and precise. The contractor is, nevertheless, entitled to additional compensation for constructing footings which exceeded the indicated depth by more than one foot, as held by the original contracting officer.

Appeals of Carson Construction Company, IBCA-21, IBCA-25, IBCA-28, IBCA-34 (Nov. 22, 1955) 62 I. D. 422

When in the performance of a contract for the completion of earthwork and structures to be paid for at unit prices, the units of work were estimated, and the specifications included a provision stating that the estimated quantities were approximations for comparing bids, and no claim should be made against the Government for excess or deficiency therein, claims of the contractor for additional compensation based on large overruns in the estimated quantities, which concededly did not result from changes in the work within the meaning of the "changes" article in the standard form of Government construction contract, are claims for breach of an implied condition of reasonability in the performance of the contract, and, as such, are claims for unliquidated damages which the Board lacks jurisdiction to consider or allow. Even though the Government erroneously estimated one of the units of work, the contract may not be reformed on the ground of mutual mistake of fact, since there was no agreement to perform so much work for a lump sum but only an agreement to perform an approximate quantity of work at so much a unit of work.

Appeal of R. P. Shea Company, IBCA-37 (Nov. 30, 1955) 62 I. D. 456

Where under a contract for the construction of a high school in the Virgin Islands, one of the specifications required the installation of an electrical tie-in between the vault in the school and a hospital, "as indicated on the plan," but the plan itself consisted of two drawings, each of which bore the notation "to hospital, N. I. C.," meaning "Not In Contract," there is an ambiguity in the contract rather than a conflict between the specification and the drawings, and the ambiguity must be resolved in favor of the contractor by not requiring it to install the tie-in. This is in accordance with the rule that any ambiguity in a Government contract must be resolved against the Government, which drafted the contract.

Appeal of the Fluor Corporation, Ltd., IBCA-53 (Jan. 23, 1956) 63 I. D. 24

CONTRACTS--Continued

SPECIFICATIONS--Continued

Claims for additional compensation arising out of the construction of the Fort Clark Unit of the Missouri River Basin Project must be rejected, when the claims are either based on alleged extra work which was required by the specifications, or the claims are for unliquidated damages not cognizable by the Board, or the contractor failed to protest against the alleged extra work as required by the specifications.

Where in the construction of a canal, the contractor chose to construct a single "railroad" type of embankment of sufficient width to encompass both banks, and then excavated the canal prism from this embankment, the contractor is not entitled to additional compensation for re-excavating or re-handling the embankment material under specifications which left the sequence of operations entirely to the contractor, and provided that the applicable unit prices were to cover all work done. The fact that there may have been no other practicable method of constructing the canal than the one adopted does not entitle the contractor to additional compensation.

Appeal of Korshoj Construction Co., Inc., IBCA-9 (May 2, 1956) 63 I. D. 129

When specifications provide that a contracting officer may designate additional borrow areas not designated on the plans, the right must be exercised reasonably. The issue of reasonability may not be raised, however, by a contractor who has concurred in the opening of a borrow area.

A contractor is not entitled to additional compensation, under the unit of a schedule for structure excavation, for quantities excavated from previously placed embankments, above the original ground line, around constant head orifice and pipe turnouts, when the specifications contain no provisions which prescribe the nature or the sequence of the contractor's operations; when standard practice in the construction of laterals does not require that the building of the structures be deferred until after all embankment work has been completed; and when the specifications state or import that payment is to be made only for excavation that is required. The fact that in some of the paragraphs of the applicable specification, which dealt with types of structures not involved in the present claim, it was specifically stated that excavation for structures would be measured for payment "below the original ground surface" does not in itself establish an ambiguity in the applicable paragraphs, which were otherwise clear but omitted this phrase. There are many ways of

expressing the same thought, and differences in the use of language do not necessarily betoken differences in meaning and intention.

Appeal of Osberg Construction Company, IBCA-32 (June 19, 1956) 63 I. D. 180

The Board must reject the contractor's claim that it is entitled to additional compensation for cutting the merchantable timber on the special tracts themselves. The contractor performed this work without making any effort to obtain an extra work order in writing as required by the contract and specifications. The performance of the work without obtaining an extra work order made it voluntary, and it has long been settled that a contractor is not entitled to additional compensation for voluntary work. The fact that partial payments were made during the progress of the work is also without significance, since such payments were only provisional; nor did the performance of the work with knowledge of the Government inspectors improve the contractor's position. A contractor may have reasons of his own for undertaking work not required by the specifications, and the inspectors would not interfere with him unless the work affected the interests of the Government. If the presence of inspectors could validate work undertaken without a written extra work order, the requirement that such an order be obtained would be rendered nugatory, since Government inspectors are always present at the sites of the work. Furthermore, the contractor has failed to show convincingly that the so-called merchantable timber cut from the special tracts was in fact merchantable. Since the definition of merchantability in the specifications was rather vague, the parties solved this problem practically by arranging to have the merchantable trees marked with yellow paint. The evidence does not warrant the conclusion, however, that the trees were so marked.

Where the parties to a contract for the clearing of a right-of-way have construed the provisions of the specifications applicable, strictly speaking, only to the right-of-way itself as applicable also to adjacent danger tree areas, the Board will adopt the practical construction put upon the requirements of the contract by the parties themselves.

When in the course of clearing the right-of-way a forest fire occurred, the contractor was required under the applicable specifications to make every reasonable effort to suppress the fire, and hence is not entitled to additional compensation to cover its costs of suppressing the fire. It is immaterial that the fire may not have been caused by its operations, and that

orders to suppress the fire were issued to the contractor by the contracting officer upon request of the United States Forest Service. If the fire was caused by the contractor's operations, it was liable, moreover, to pay to the Forest Service its costs of suppressing the fire, and damages for injury to National forest lands, and the contracting officer was justified in withholding from payments due to the contractor an amount sufficient to cover this contingent liability. Although the contracting officer has found that the fire was caused by the contractor's operations, and is liable to the Forest Service for its costs and damages, his finding is a mere conclusion wholly unsupported by the evidentiary facts, and he is directed to revise his finding to remedy this defect.

When the specification governing the clearing of the special tracts and adjacent danger tree strips provided that the landowners would "remove any merchantable timber required to be cut by these specifications," the specification was ambiguous. When all the officers of the Government supervising the performance of the contract, including presumably the contracting officer, assumed that the landowners would both cut and remove the merchantable timber on these tracts and adjacent danger tree strips, and indeed negotiated with the contractor for a long time with respect to additional compensation for cutting the merchantable timber on the danger tree strips, the Board will adopt the practical construction put upon the contract by the parties, especially in view of the familiar rule that any ambiguity in a Government construction contract must be resolved against the Government. Consequently, the contractor is entitled to additional compensation for the extra work which was the subject of the negotiations.

Appeal of Paul C. Helmick Co., IBCA-39 (July 31, 1956) 63 I. D. 209

Although approximate quantities provisions included in specifications have varied greatly in their phraseology, and these variations, particularly when coupled with differences in other provisions of the contract, could conceivably affect the result in individual cases, such provisions have been generally held to mean that the quantities of work actually required to be performed under the contract, whether greater or less than the quantities stated in the schedule, are to be paid for at the unit prices bid by the contractor, and that the mere existence of an overrun above or an underrun below the schedule quantities is not sufficient cause for the allowance of an equitable adjustment predicated on the actual cost of the work done by the contractor.

CONTRACTS--Continued

SPECIFICATIONS--Continued

A contractor is not entitled to additional compensation by reason of an overrun in compacted embankment work over the estimated amount of such work indicated in the schedule, notwithstanding that this estimate was erroneous, when the specifications included an approximate quantities provision; when the amount of compaction work actually required of the contractor conformed to the dimensions and standards prescribed by the drawings and specifications; and when the contractor could have roughly computed this amount from the drawings before submitting its bid. A memorandum issued by one of the Government engineers to the contractor at its request in which the compacted and uncompacted embankment work remaining to be done was computed in tabular form in general conformity with the requirements of the specifications and drawings did not constitute a change within the meaning of the "changes" article of the contract, and hence did not entitle the contractor to additional compensation.

Appeal of J. D. Armstrong Company, Inc., IBCA-40 (Aug. 17, 1956) 63 I. D. 289

A contractor who has constructed compacted embankments to a greater width than called for by the specifications in order to serve his own convenience is not entitled to compensation for the excavation of the additional material so used when the specifications provided for payment only for "required" excavation, and the narrower embankments required by the specifications could have been constructed with standard excavating and rolling equipment either by constructing a railroad type of embankment or by patrol blading. It is immaterial under the circumstances of the case that the wider embankment could be used by the Government as a roadway for maintenance purposes.

A contractor is not entitled to additional compensation for placing in canal embankments material excavated from the canal, even though some of the material had to be rehandled (since the embankments could not be built until a lining had been placed in the canal), when under the terms of the specifications suitable material removed in excavation was to be used in the construction of embankments, and the unit price for canal excavation was to cover the cost of all work in connection with the construction of canal embankments.

Appeal of McWaters and Bartlett, IBCA-56 (Oct. 31, 1956)

When a specification requires that the contractor shall submit a construction program to the contracting officer but does not provide for its approval by him, it must be assumed that it

CONTRACTS--Continued

SPECIFICATIONS--Continued

was submitted merely for the information of the Government. Moreover, even if provision had been made for the approval of the construction program, such approval could not be given by the construction engineer unless authorized to do so by the contracting officer. Consequently, although the Government had undertaken to furnish certain equipment to the contractor, it was not obligated, merely because of the submission of the construction program, to furnish such equipment in such sequence as would enable the contractor to fulfill the construction program without incurring the assessment of liquidated damages.

Appeal of A. S. Horner Construction Co., IBCA-75 (Dec. 20, 1956) 63 I. D. 401

A contractor's claim for additional compensation for placing gravel under tower footings to stabilize the foundations must be disallowed when the record shows that the contractor adopted this method for its own convenience to solve a dewatering problem which was its responsibility under the terms of the applicable specifications.

A contractor's claim for additional compensation, based on the delay of the Government in making timely delivery of steel members to be incorporated in towers to be erected by the contractor under specifications which did not prescribe the contractor's sequence or mode of operations, nor fix definite dates for the delivery of the steel members, is a claim for unliquidated damages that may not be administratively settled.

Appeal of Parker-Schram Company, IBCA-71 (Jan. 31, 1957)

Where the specifications contain an approximate quantities provision, a contractor is not entitled to additional compensation by reason of underruns in estimated quantities of crushed-rock blanket and riprap merely because the Government changed the design prior to the advertisement for bids but neglected to correct the estimates, if in fact the schedule quantities could have been verified by the contractor from the information supplied by the drawings and specifications. The mere fact that there was some degree of uncertainty in estimating the quantities from the drawings and specifications is immaterial if the degree of uncertainty was not appreciable.

Appeal of Texas Construction Company and Hyde Construction Company, IBCA-73 (Apr. 23, 1957) 64 I. D. 97

CONTRACTS--Continued

SPECIFICATIONS--Continued

Under a contract for the construction of Section "G" of the Richardson Highway in Alaska, the contractor is not entitled to additional compensation under the "changes" and "changed conditions" articles of the contract, notwithstanding the fact that the locations and yields of the borrow pits indicated on the plans did not reflect the yields of the borrow pits used in construction. Not only did the Government not guarantee the data indicated in the plans and reserve the right to establish substitute borrow pits when pits indicated on the drawings failed but the Government also under the terms of the special provisions of the contract modifying the "changes" and "changed conditions" articles reserved the right to make changes in the plans to meet unanticipated field conditions, and limited the right of the contractor to additional compensation to instances in which there were overruns or underruns in excess of 25 percent of estimated quantities. The contractor was, therefore, entitled to additional compensation only to the extent that borrow and overhaul exceeded the stated limitation.

Appeals of Morrison-Knudsen Company, Inc., IBCA-36 and IBCA-50 (May 27, 1957)
64 I. D. 185

The question whether a contractor who was engaged in the rehabilitation of an existing irrigation system may be required to repair storm damage to the work outside the pay or neat lines of the contract depends in large part upon whether the contractor was negligent in its operations prior to the occurrence of the storm. Although under the terms of the contract the contractor was required to repair the storm damage irrespective of fault on its part, this obligation would be limited to the restoration of the work it had undertaken under the contract. On the other hand, if the contractor were guilty of negligence in the conduct of its operations prior to the storm, it would be obligated to repair any damage attributable to its negligence, whether within or without the pay or neat lines. However, even though the contractor were not negligent, the scope of its obligation to repair storm damage would not be so narrow that it could not be required to do any work that was outside the pay or neat lines, nor so wide that it could be required to restore any property of the Government that may have been damaged by the storm. Thus, the contractor, who was required to make an opening through an embankment, was not obligated to rebuild other portions of it, irrespective of the relationship of this work to the restoration of the area excavated by the contractor or to the completion of other features of the contract work.

Appeal of Barnard-Curtiss Company, IBCA-82 (Aug. 9, 1957)
64 I. D. 312

CONTRACTS--Continued

SPECIFICATIONS --Continued

The existence of an error in calculating an estimated quantity of excavation and of a further unexplained discrepancy between the estimated quantity of excavation and the actual excavation does not in itself establish that a contracting officer was wrong in finding and concluding that the contractor could have made a sufficiently accurate calculation of the probable amount of the excavation by utilizing information supplied by the drawings and specifications, and that, in view of the approximate quantities provision included in the specifications, additional compensation could not be allowed by reason of a substantial underrun below the estimated quantity.

Appeal of the Diamond Engineering Company, IBCA-93 (Dec. 20, 1957)

A claim for additional compensation made by a tunneling contractor on the ground that it encountered "changed conditions" within the meaning of the first category of conditions specified in the U. S. standard form of Government construction contract, namely conditions materially different from those indicated by the drawings or specifications, cannot be allowed where the specifications provided that the geological conditions were not guaranteed, and that no additional allowance would be made for tunnel excavation on account of the nature or condition of any of the material encountered, and the drawings, although they contained in summary form logs of exploration, or drill hole information, were in themselves only representations of what was found in the particular drill holes rather than representations of what the contractor would encounter in actual excavation.

A claim for additional compensation made by a tunneling contractor on the ground that it encountered "changed conditions" within the meaning of the second category of conditions specified in the U. S. standard form of Government construction contract, namely conditions of such an unusual nature that they could not reasonably have been anticipated by the contractor, may be allowed notwithstanding the inclusion of caveatory, or exculpatory provisions in the specifications. Nevertheless, the burden of proving a claim in the second category is a fairly heavy one, since the contractor must show not only that it encountered conditions that were unexpected to it but also that the conditions encountered would have been generally regarded as unexpected by others engaged in the same type of operations. Therefore, such a claim must be rejected when the record shows that the contractor made only a hurried and casual prebid investigation; the specifications required the tunnels constructed to be fully supported; the drill hole information indicated the possibility of encountering adverse geological conditions; and the percentage of overbreak experienced by the contractor was only slightly more than should

CONTRACTS--Continued

SPECIFICATIONS--Continued

have been expected in view of the geological conditions, and the slight excess may have been attributable to the contractor's methods of operation.

A claim for additional compensation made by a tunneling contractor on the ground that it was compelled to excavate two inches below the spring lines of the tunnels throughout their lengths in order to provide space for installing steel lagging outside the steel ribs must be rejected when the contractor was paid, in accordance with the provisions of the specifications, for such additional excavation in the reaches of the tunnels as was necessary to permit the installation of steel lagging, and the installation of steel lagging was wholly unnecessary in other long reaches of the tunnels.

A claim made by a tunneling contractor for remission of an overbreak charge because a certain yardage of the overexcavation was utilized in enlarging areas of the tunnels that intersected with a tunnel constructed under another contract must be rejected, since whatever change was involved was made under another contract, and did not in any way affect the quantity or characteristics of the work called for under the contract under which the claimant contractor operated, and the overbreak charge was made strictly in accordance with the terms of that contract.

Appeal of J. A. Terteling & Sons, Inc., IBCA-27 (Dec. 31, 1957) 64 I. D. 466

A contractor engaged in the construction of a helium plant, who was expressly required by the terms of the specifications to make "every reasonable effort" to safeguard the plans for the plant and to assure that its employees were loyal Americans, was impliedly required to bear the cost of a security check of its employees to be made by an outside investigative agency.

Appeal of Quaker Valley Constructors, Inc., IBCA-89 (Jan. 31, 1958) 65 I. D. 53

Where a contract contains separate unit bid prices for the puddling and for the compaction of backfill, and contains specifications which limit puddling to backfill that is composed of silty material and require compaction for backfill that is composed of sand or gravel, a provision in the contract which authorizes the contracting officer to direct that unsuitable foundation material be removed and replaced with selected material and which states that the puddling or compaction of such refill material shall be paid for at the unit bid price for the

CONTRACTS--Continued

SPECIFICATIONS--Continued

puddling or compaction of backfill, as the case may be, is to be interpreted as calling for the compaction, rather than the puddling, of refill material that is composed of sand and gravel.

Appeal of Duncan Construction Company, IBCA-91 (Apr. 2, 1958) 65 I. D. 135

When the Government ordered a supply of copper tubing which was to be used in the fabrication of heat exchangers, and the straightness of the tubes was of "paramount" importance but the specifications, although they included straightness among the characteristics of workmanship, failed to specify a tolerance for straightness, the supplier was entitled to additional compensation for straightening the tubing after delivery in order to meet the Government's requirement for straightness, which allowed a tolerance of only one hundredth of an inch per foot.

Appeal of Atlantic Aluminum & Metal Distributors, Inc., IBCA-129 (Apr. 22, 1958) 65 I. D. 173

After the occurrence of a storm, which damaged an excavation for anchors and footing for spillway 30-ton cableway, the contracting officer allowed the contractor an option in performing the necessary repair work between placing concrete to the limits of the excavation or forming to the neat line of the structure, in addition to requiring him to clean out the excavation. The contractor conceded his obligation to remove the materials that had sloughed into the excavation but contended that it could not be required to re-excavate beyond the neat lines or to place concrete fill in this area. Although the specifications required excavation to be made only to the neat lines of the structures, and it was contemplated that forming would be necessary only above ground levels, the repair of storm damage is not generally regarded as extra work, even though it is not contemplated by the specifications, and hence the contractor was not entitled to additional compensation unless it could show that the contracting officer, in allowing it a choice only between two alternatives prevented it from adopting still another method which was reasonably adapted to the requirements of the situation and which would have been less expensive than either of the two methods which were allowed. It is immaterial that the cost of repairing the storm damage was disproportionate, or that the work to be performed under the contract was limited to foundation work.

Appeal of Younger Bros., Inc., IBCA-148 (May 28, 1958) 65 I. D. 238

CONTRACTS--Continued

SPECIFICATIONS--Continued

The claim of a contractor engaged in the construction of substations for the Bonneville Power Administration that he was obliged to incur expenses for overtime by reason of an order of the contracting officer to accelerate the work must be rejected when it appears that the contractor was greatly behind in his work at that time; that the contracting officer had the express right under the specifications to direct that the contractor's work force be increased when a satisfactory rate of progress was not being maintained; and that the contracting officer merely authorized the overtime work. Although the contractor had prior thereto requested an extension of time, and the contracting officer had failed to act on the request, the contractor cannot be said to have been prejudiced when the request was not made at the time the delays occurred; the contractor did not demur against the contracting officer's inaction; and the contracting officer, after virtually granting the contractor's request at the time the work was ordered to be accelerated, finally granted an adequate extension of time.

The damage claims of a contractor engaged in the construction of substations for the Bonneville Power Administration based on alleged orders of inspectors to perform work in excess of, or contrary to the requirements of the specifications, must be rejected when the claims are not supported by credible evidence and the contractor did not protest to the inspectors' superiors at the time such work was performed, and request them to determine whether the orders of the inspectors were arbitrary and unreasonable.

Appeal of W & W Company, IBCA-54 (Aug. 4, 1958)

A contractor is not entitled to an extension of time for performance on the ground that the Government required the installation of a different type of pump than that designated in the specifications when there is no showing that either type of pump, the delivery of which would have required from 60 to 90 days, would have arrived on the job at the time of its contemplated installation.

A contractor who is entitled to an extension of time for performance by reason of such an unforeseeable cause as "unusually severe weather" is none the less entitled to such relief, despite the fact that its progress schedule, which it was required by the specifications to furnish to the Government merely for the latter's information, may have indicated that no work was originally scheduled during part of the period when the unusually severe weather occurred.

Appeal of Black Hills Ditching Co., Inc., IBCA-145 (Aug. 15, 1958) 65 I. D. 342

CONTRACTS--Continued

SPECIFICATIONS--Continued

A specification of a Government construction contract which enumerates the individual components of capacitor equipments and requires the contractor to install "the complete capacitor equipments" is not ambiguous, so far as the contractor's duty to assemble the individual capacitor units and associated equipment into Var-Blocks, is concerned.

Appeal of Wismer & Becker Electric, Inc., IBCA-136 (Sept. 22, 1958) 65 I. D. 388

A specification provision that payment for material excavated from a borrow pit shall be exclusive of overburden stripped from the pit and that the usable material to be paid for shall be "measured in original position" necessitates a determination of the elevation of the underside of the overburden in its original position before stripping, and is not complied with by a measurement which reflects the size of the whole pit upon completion of all excavation less the volume of the overburden in its position at that time, irrespective of whether or not in such measurement an allowance is made for swelling of the stripped overburden.

Appeal of Larsen-Meyer Construction Co., IBCA-85 (Nov. 24, 1958) 65 I. D. 463

Under specifications which provided that the contractor furnish and install in a compacted state gravel bedding for a concrete lining in an irrigation lateral and that the gravel bedding so installed should be measured for payment in the most practicable manner, either to the outlines of the areas covered with gravel bedding and to an average thickness, or in approved vehicles at the point of delivery, the contracting officer had a choice between these two alternative methods of measuring the gravel bedding for payment. Whichever method was chosen, however, payment would have to be made for the gravel in a compacted state, and, if payment were based on loose truck measurements of the gravel, a compaction factor would have to be applied to the gravel so measured. It is apparent that if either method of measuring the gravel for payment presupposed its measurement in a compacted state, the other method must also presuppose this, since both methods, to be equitable must produce equivalent results. The fact that bidders were unable to determine the factor of compaction in advance, since the source of the gravel was subject to the approval of the contracting officer, proves no more than that the contract involved elements of uncertainty or risk for the contractor. Differences of nomenclature to be found in various items of the schedule and specifications with respect to payment do not demonstrate an ambiguity in the

provisions for payment of the gravel bedding, since the language was not exactly parallel and the provisions for the performance of the various items differed substantially. The fact that Government inspectors kept a truck count tally of the gravel bedding is not a practical construction requiring payment for the gravel by loose truck measurement, since they reported generally all operations under the contract; the information was useful for other purposes, such as the making of progress payments; and the contracting officer was not bound to determine how the gravel should be paid for until after it had been placed. The contracting officer did not abuse his discretion in paying for the gravel bedding on the basis of cross sections taken prior to the placing thereof, since the record shows that the practice of using cross sections in measuring earthwork for payment is common, and the contractor has failed to bear the burden of proving that there were circumstances that made the use of the cross sections unfair.

Appeal of Glenn Dusky, IBCA-130 (Dec. 11, 1958) 65 I. D. 489

A contract in which the quantity of hauled excavation needed to construct the core of a dike across a marsh is estimated, and which includes an "approximate quantities" provision, together with a provision that settlement of the fill below the natural marsh line in varying amounts is expected, cannot be said to contain any definite representation concerning the amount of subsidence to be expected, and hence neither a "change" nor a "changed condition" can be said to have been established merely by showing that the estimated quantities of work had been substantially increased by the contracting officer by an order denominated a "change order."

Whatever may be the general scope of a provision in the specifications, empowering the contracting officer to suspend the work when conditions were "unfavorable for the prosecution of the work," it is clear that it cannot be held to extend to a situation that was foreseeable in view of other provisions of the specifications, which warned the contractor of the very same conditions and extended the time of performance by reason thereof.

Appeal of Reid Contracting Company, Inc., IBCA-74 (Dec. 19, 1958) 65 I. D. 500

A claim for additional compensation made by a tunneling contractor, who expected that the tunnel would be drilled entirely through andesite rock but who found that, except for short distances near the portals, the tunnel had to be drilled through volcanic tuff breccia, may not be allowed under the "changed conditions"

CONTRACTS--Continued

SPECIFICATIONS--Continued

clause of the standard form of Government construction contract when the evidence shows that the tunnel was drilled through a volcanic mountain area of rapidly changing formations, the geologic data set out in the contract drawings was insufficient to reflect the subsurface geology of the central reaches of the tunnel, the Government in the specifications explicitly and emphatically disclaimed knowledge of subsurface conditions in those reaches, and the surface geology was likewise insufficient to justify a conclusion that the tunnel would be driven through andesite rock for its entire length, and provision was also made in the specifications for contingencies that indicated that difficulties might be encountered in the excavation. In view of all these circumstances, the fact that the tunnel had to be more fully supported than the Government expected is not significant, especially since it appears that the amount of supports represented a compromise between the Government's engineers and the State safety inspectors in order to prevent the work from being shut down. Since the tuff breccia encountered by the contractor was not absolutely continuous; there were variations in the structure and other qualities of the material; and the record fails to show that the amount of tuff breccia exceeded the amount that could reasonably have been anticipated, there must also be rejected the contractor's contention that it could not reasonably have expected to encounter a continuous stretch of almost 3,000 feet of tuff or tuff breccia in variable volcanic material in a tunnel which was approximately 3,600 feet long.

Appeal of George A. Lord and William T. Lord, Partners, d/b/a Lord Bros. Contractors, IBCA-125 (Feb. 16, 1959) 66 I. D. 34

A request of a roadway contractor for reconsideration of a borrow claim, which is based on the contention that the Board could not give effect to deviations from the "changes" and "changed conditions" clauses of the U. S. standard form of construction contract that limited the applicability of these clauses because deviations were prohibited by the regulations relative to public contracts, must be denied. Such regulations are simply for the protection of the Government against its own officers, and hence may not be enforced against the Government by a contractor seeking to avoid the obligation of its contract. Moreover, although the courts have declared the standard "changes" and "changed conditions" clauses to be paramount as against caveatory or exculpatory provisions in the specifications of a general nature, this is not equivalent to a prohibition upon deliberate deviations. The standard provisions are paramount as against inconsistent specifications only in cases in which there is no other aid to interpretation than the provisions of the standard form itself.

A motion for reconsideration of a claim of a roadway contractor based on the allegation that the Government by deleting a select borrow surface course, which the contractor had planned to use to correct deficiencies in the subgrade, and by failing to supply suitable topping

CONTRACTS--Continued

SPECIFICATIONS--Continued

material for finishing the subgrade both prior and subsequent to the deletion, had increased the contractor's costs in finishing the subgrade must be denied when it appears that (1) the contractor has not borne the burden of proving that it made every reasonable effort to conserve suitable topping material from excavation and borrow, as required by the specifications, and that the Government failed to designate borrow pits from which suitable topping material could be obtained; (2) the initial grading by the contractor had been very rough; (3) the gravamen of the contractor's complaint was really that too much of the borrow material had to be windrowed rather than that it was unsuitable; (4) the contractor's alleged plan to make good the deficiencies of the subgrade with select borrow was an afterthought and the alleged plan would in any event have been inconsistent with the requirements of the specifications relative to the laying down of the subgrade, and might have involved greater expense than the use of ordinary borrow; and, finally, (5) the contractor failed to give timely notice of and protest against the alleged denial of suitable topping material.

Appeal of Morrison-Knudsen Company, Inc., IBCA-36 and IBCA-50 (Mar. 23, 1959) 66 I. D. 71

Bridge construction contractors, who were required to paint the steel work of the bridges constructed by them and who were delayed in the completion of the work due to their inability to identify the proper types of paint required by the specifications, are not entitled to an extension of time for performance when it appears that the paint types were sufficiently identifiable by reference to specifications of the American Association of State Highway Officials.

Bridge construction contractors who in pouring concrete for the decks of two bridges constructed by them were required to do so in a particular sequence or manner, which necessitated the installation of construction joints not contemplated by the specifications, were directed to perform extra works, and hence are entitled to additional compensation and extensions of time for the performance of the work.

Bridge construction contractors, who were instructed to cut and recess a few metal stirrups used to hold the reinforcing steel in place while the concrete for the bridges was being poured, were not directed to perform extra work, since the work was so inconsequential that it did not materially affect the whole operation of getting the concrete true, even and free from projections, as required by the specifications.

Appeal of Cox and Haddox, IBCA-155 (Mar. 26, 1959) 66 I. D. 97

CONTRACTS--Continued

SPECIFICATIONS--Continued

A contractor who, in excavating for a septic tank and seepage pits, which were to be parts of a sewage disposal system for a school in a town in Alaska, encountered a water table that fluctuated seasonally, as well silt of a fluid consistency, although such conditions were contrary to indications in the plans, with the result that the Government engineers to avoid health hazards had to redesign the sewage disposal system entirely, may be said to have encountered unanticipated conditions which were "changed conditions" within the meaning of the applicable contract provision, notwithstanding that the specifications included also a general caveatory provision with respect to soil conditions. The acceptance by the contractor of the change orders, which provided for the redesign of the sewage disposal system, did not bar it from requesting an equitable adjustment of its increased costs prior to the redesign of the system.

Appeal of Waxberg Construction Company, IBCA-144 (Mar. 31, 1959) 66 I. D. 123

Additional compensation, sought after completion of all of the work, for an overrun in masonry work in the construction of a culvert in Rock Creek Park, due to a discrepancy between the drawings and one of the notes on the drawings, must be denied, where the contractor failed to comply with the terms of the contract and specifications which required that it call such discrepancies to the attention of the contracting officer and warned that any work performed without his determination would be at its own risk and expense.

When a contract for the construction of a bridge and culverts in Rock Creek Park included both unit and lump sum items, an approximate quantities provision of the specifications, which in terms was made applicable only to unit items did not in itself bar additional compensation for overruns in the lump sum items.

Appeal of General Excavating Company, IBCA-150 (May 25, 1959)

A claim for additional compensation by a contractor under the first category of the "changed conditions" clause of the contract, relating to divergent conditions, as distinguished from the second category of "changed conditions," relating to unanticipated conditions, on the ground that it encountered large quantities of hard material which, in view of the logs of subsurface exploration made available to it in the drawings, it could not reasonably have expected must be denied when the logs of exploration were outside the area to be excavated, and did not generally penetrate to grade, and in any event indicated that large quantities of hard material were present, and the presence of such hard material could have been ascertained by a more adequate site investigation. Whether or

CONTRACTS--Continued

SPECIFICATIONS--Continued

not logs of exploration can be regarded as unqualified representations must depend on the circumstances of each individual case. When a contract charges a contractor with the duty of investigating the site of the work, it must make such an investigation, whether or not it is asserting a changed condition in the first or the second category, unless indeed, the claim is based on a representation of such a nature that a site investigation would be completely pointless. However, the standard of adequacy in conducting a site investigation may well be less rigorous in first than in second category cases.

Appeal of Inter-City Sand and Gravel Co. and John Kovtynovich, IBCA-128 (May 29, 1959) 66 I. D. 179

A railroad construction contractor who was to rehabilitate mileage of The Alaska Railroad and, in so doing, was required by the terms of the specifications to effect two separate track lifts totaling six inches with new crushed ballast from a pit located at Spencer, Alaska, did not satisfy the requirement for one of these lifts when in the course of replacing and respacing the ties it gave the track an initial or out-of-face lift, and tamped the old ballast to achieve a sound road bed for the replaced and respaced ties, even though when the track was lowered back to the road bed it may have been higher than before the commencement of the operations. As the out-of-face lift was either work that necessarily had to be performed to carry out the purposes of the contract, or was performed for the convenience of the contractor, it cannot qualify as extra work entitling the contractor to additional compensation. There was also nothing in the correspondence and negotiations relating to the approval by the contracting officer of the contractor's progress schedule which could be said to have effected a practical interpretation of the requirements of the specifications with respect to the track lifting operations inconsistent with their literal terms.

Under a contract for the rehabilitation of The Alaska Railroad which provides for an equitable adjustment in case of overruns of quantities of more than 25 percent, the contractor is nevertheless not entitled to an equitable adjustment in the unit price on account of such an overrun in the quantity of ballast loaded, hauled, and placed when the evidence fails to show, at the very least, that the contractor's actual costs for loading, hauling, and placing the ballast, together with a reasonable allowance for profit thereon, exceeded the bid price. This cannot be said to have been established merely by testimony of the contractor's chief officer that the bid would have been higher if he had known that the railroad would not supply ballast loading equipment, where there was nothing in the specifications which required the railroad to supply such equipment.

Appeal of William A. Smith Contracting Company, Inc., IBCA-83 (Jun. 16, 1959) 66 I. D. 233

CONTRACTS--Continued

SPECIFICATIONS--Continued

A contractor which was required to prepare and furnish aerial photographs and topographic maps for an irrigation project within a specified time and which under the terms of the specifications was subject to the imposition of liquidated damages for failure to make delivery of such materials on time cannot be said to have effected timely delivery when the materials delivered contained serious defects requiring an extended period for correction.

Appeal of Air Survey Corporation, IBCA-152 (Jun. 30, 1959) 66 I. D. 246

Under a contract providing for the installation and leasing by the contractor of an FM radio communications system in the Great Smoky Mountains National Park, the contractor is entitled to rental payments on a 12-month basis for the operation of three repeater stations incorporated by it in the bid schedule, notwithstanding the fact that the repeater stations were subsumed under a general provision of the schedule calling for operation of the relevant control points on a 5-month basis, when it appears that (1) the specifications contemplated that bidders could modify the bid schedule; (2) the communication system would not function without the operation of the repeater stations all 12 months of the year; and (3) this was made clear by a technical proposal accompanying the bid, together with an explanatory covering letter, which was accepted by the contracting officer as part of the contract.

Appeal of Land-Air, Inc., IBCA-192 (Nov. 30, 1959) 66 I. D. 402

SUBCONTRACTORS AND SUPPLIERS

Insolvency of a subcontractor or supplier is not an unforeseeable and excusable cause of delay entitling a contractor to the benefits of an escalation clause.

Appeal of the Pelton Water Wheel Company and Byron Jackson Company, IBCA-16 (Oct. 12, 1955) 62 I. D. 385

Although in general a contractor who has taken an appeal should be prepared to substantiate the claim before the Board with reasonable promptness, and should not, indeed, present the claim unless he has reason to suppose that it is meritorious, the Board will grant a request of

CONTRACTS--Continued

SUBCONTRACTORS AND SUPPLIERS--Continued

the contractor that consideration of the claim by the Board be deferred pending the outcome of litigation between the contractor and his subcontractor when counsel for the Government does not object, and it appears from the nature of the claim that the interests of the Government will not be prejudiced. Although the present case will be marked "closed" on the Board's docket, the contractor may file a request that it be reopened, within a reasonable time after the determination of the litigation in which it is involved.

Appeal of Osberg Construction Company, IBCA-32 (June 19, 1956) 63 I. D. 180

A contractor may prosecute a claim against the Government for work performed or materials furnished by a subcontractor, irrespective of whether the contractor is liable to the subcontractor for such work or materials, but the subcontractor may not prosecute such a claim against the Government because there is no express or implied contract between the subcontractor and the Government.

The timeliness of an appeal is governed by the time that elapsed between the date when the findings of fact and decision were received by the contractor and the date when the notice of appeal was mailed to the contracting officer, and not by the time that elapsed between the date when the findings of fact and decision were received by a subcontractor for whose benefit the contractor is prosecuting the appeal and the date when the appeal papers were mailed to the contractor by the subcontractor.

Appeal of Wiscombe Painting Company, IBCA-78 (Oct. 26, 1956)

Ordinarily, delays by a subcontractor will not excuse the prime contractor from making timely delivery unless the delays resulted from excusable causes of delay.

Appeal of Zinsco Electrical Products, IBCA-104 (June 3, 1957)

A contractor who was entirely cooperative, and who would have provided additional works to protect its operations in rehabilitating an existing irrigation system, if such works had been clearly demanded or even suggested by project personnel, cannot be held to have been negligent in the conduct of its operations when a storm occurred that proved to be of such

CONTRACTS--Continued

SUBCONTRACTORS AND SUPPLIERS--Continued

magnitude that its consequences could hardly be said to have been foreseeable either by the contractor or by project personnel. The burden of proving that the contractor was negligent rests on the Government in such circumstances, and this burden cannot be sustained simply by showing failure on the part of the contractor to coordinate effectively the work of its subcontractors, so that they would perform the subcontracts on time, if the prime contractor did not breach its obligation of timely performance towards the Government, nor by showing that the prime contractor performed other acts in the course of construction which may not have been causative factors in magnifying the damage caused by the storm. However, the contractor was guilty of negligence when, having completed a wasteway structure, he failed to place the backfill above the structure for a period of approximately 6 months prior to the storm, since such neglect would expose the structure to damage even in an ordinary rainy season.

Appeal of Barnard-Curtiss Company, IBCA-82 (Aug. 9, 1957) 64 I. D. 312

Under a supply contract under which the delays of a contractor were excusable when due to causes beyond its control and without its fault or negligence, and the delays of a subcontractor were excusable when due to the same causes, a steamship company cannot be regarded as a "subcontractor" of a supply contractor, which was late in effecting shipment of an autotransformer as required by the contract, so that its delays would excuse those of the contractor. The steamship company was rather an agent of the contractor for the purpose of effecting delivery of the autotransformer, and the delays of the agent are chargeable to its principal, even though such delays may have been beyond its control and without its fault or negligence.

Appeal of the Legnano Electric Corporation, IBCA-114 (Dec. 18, 1957)

The action of a prime contractor in filing a claim with the contracting officer on behalf of a subcontractor does not in itself suffice to ground an appeal to the Board of Contract Appeals that is subsequently taken by the subcontractor alone. A provision in a subcontract making the subcontractor subject to all the terms of the prime contract is insufficient to create privity of contract between the Government and the subcontractor, even though the prime contract provides also that all subcontracts shall be subject to the approval of the contracting officer.

Appeal of Young and Smith Construction Company, IBCA-151 (June 18, 1958) 65 I. D. 274

SUBCONTRACTORS AND SUPPLIERS--Continued

The failure of a contractor's supplier to prepare promptly necessary motor drawings and design data required for the performance of a supply contract would not alone be sufficient to relieve the contractor of a contractual obligation to submit such drawings and design data within the prescribed periods of time, or to constitute an excusable cause of delay.

Where a supply contractor under a contract for the furnishing of motor-driven pumping units failed to submit for Government approval within the time prescribed by the contract the assembly and construction drawings and design data for the motors; delayed placing its order for the motors with its supplier until after the prescribed time for submission of the drawings and design data; failed to call the supplier's attention to the deadlines; after receiving the drawings from its supplier delayed submitting them to the Government, and failed to show that production of the motors by the supplier was delayed by an act of the Government, the contractor has not met the burden of proving that it is entitled to an additional extension of time based on an excusable delay under the delays-damages clause.

Appeal of C. H. Wheeler Manufacturing Company (Economy Pumps, Inc., Division), IBCA-127 (Sept. 12, 1958) 65 I. D. 382

The mere delay of a supplier in delivering materials which are necessary to enable a contractor to perform is not in itself sufficient to constitute an excusable cause of delay.

Appeal of Truax Machine & Tool Company, IBCA-195 (Jul. 21, 1959)

A contractor, who undertook to fabricate and supply turbines for a power plant, and who seeks to excuse its delays in the performance of the contract on the grounds that its subcontractors were delayed by the occurrence of a steel strike and by work having national priority is not entitled to an extension of time for performance when it has failed to prove either of its contentions by substantial evidence. It is necessary for the contractor to show not only that the steel strike occurred but also that it was a factor responsible for delay.

Appeal of The James Leffel and Company, IBCA-205 (Oct. 8, 1959)

SUBSTANTIAL EVIDENCE

Where contractor on appeal has submitted affidavits tending to establish that he was not responsible for the incorrect installation of a sewer, and the Government offers no counter proof of a substantial nature, the contention of the contractor must be accepted.

Appeal of Art Pugsley, D/B/A Art Pugsley Construction Co., IBCA-5 (Feb. 25, 1955) 62 I. D. 54

The claim of a contractor for additional compensation for laying a pipe across a stream under somewhat changed conditions must be denied to the extent that the amount claimed exceeds that offered by the Government when the contractor's testimony is vague and inconsistent with the documentary evidence in the case, and the contractor arrived at the amount of his claim simply by subtracting his original estimate of the cost of crossing the stream from what he claimed were his actual costs.

Appeal of S. M. Johnson, d/b/a Johnson Construction and Maintenance Company, IBCA-13 (Aug. 18, 1955)

Where the Government verbally directs the contractor to erect a building at an elevation one foot lower than that shown on the original drawings, making no mention of a change in the contract price, and more than two years later issues a change order not supported by adequate proof charging the contractor with $4,030 for saved backfill as the result of such lowering of the building, the Government cannot recover by way of counterclaim, the burden of proving a counterclaim being on the Government.

Appeal of Johnson Construction and Maintenance Company, IBCA-15 (Oct. 28, 1955)

A contractor who was entirely cooperative, and who would have provided additional works to protect its operations in rehabilitating an existing irrigation system, if such works had been clearly demanded or even suggested by project personnel, cannot be held to have been negligent in the conduct of its operations when a storm occurred that proved to be of such magnitude that its consequences could hardly be said to have been foreseeable either by the contractor or by project personnel. The burden of proving that the contractor was negligent rests on the Government in such circumstances,

and this burden cannot be sustained simply by showing failure on the part of the contractor to coordinate effectively the work of its subcontractors, so that they would perform the subcontracts on time, if the prime contractor did not breach its obligation of timely performance towards the Government, nor by showing that the prime contractor performed other acts in the course of construction which may not have been causative factors in magnifying the damage caused by the storm. However, the contractor was guilty of negligence when, having completed a wasteway structure, he failed to place the backfill above the structure for a period of approximately 6 months prior to the storm, since such neglect would expose the structure to damage even in an ordinary rainy season.

Appeal of Barnard-Curtiss Company, IBCA-82
(Aug. 9, 1957) 64 I. D. 312

When the contractor has not met the burden imposed on it of establishing by substantial evidence the validity and amounts of its claims based on the "changed conditions" or "extras" provisions of the contract, an appeal from adverse decisions of the contracting officer must be denied. Specifically, the contractor has the burden of proving that the contracting officer was wrong in concluding that a proper site investigation would have enabled a reasonably prudent and experienced contractor to have anticipated the conditions encountered. Ordinarily, statements in claim letters are not sufficient proof of essential facts which are disputed.

Appeal of AAA Construction Company, IBCA-55
(Nov. 26, 1957) 64 I. D. 440

A factual statement by a contractor in a notice of appeal is a mere allegation of what the contractor asserts to be the facts, and, if disputed by the Government, cannot be accepted as proof that the facts so asserted are true.

In an appeal attacking the validity of a finding of fact or decision by a contracting officer, not patently erroneous, it is incumbent upon a contractor who advances a claim against the Government that was denied by such finding or decision to come forward with evidence showing error therein, and in the absence of such evidence the Board of Contract Appeals cannot properly overrule the decision of the contracting officer. In such a case the burden of the appeal is upon the contractor's shoulders, and that burden calls for evidence on the contractor's side to show that the action taken by

the contracting officer was erroneous, for the findings of a contracting officer are presumed to be correct in the absence of proof to the contrary.

Appeal of Duncan Construction Company,
IBCA-91 (Apr. 2, 1958) 65 I. D. 135

Under a contract for the clearing of a transmission line right-of-way within a national forest which provides that the contractor shall pay "suppression costs and damages resulting from any fires caused by his operations," a claim by the Government for payment of such costs and damages is allowable when the fact that the fire was caused by the contractor's operations is established by a preponderance of the evidence. Evidence showing that the fire started at a place where smoking would have been particularly dangerous and would probably have resulted in the immediate discharge of an employee detected in so doing, that a group of the contractor's employees ate lunch extremely close to this place within approximately 30 minutes before the discovery of the fire, that one of these employees was an habitual smoker, that following the lunch period this employee had a clear opportunity for undetected smoking at the place where the fire started, that the possibility of the fire having been started by occurrences other than smoking was remote, that the possibility of persons other than the contractor's employees having been sufficiently close in point of time and distance to have started the fire was likewise remote, and that the employee who was an habitual smoker had not denied that he did smoke during or after the lunch period, but, in statements made shortly after the fire, had asserted that, while he was aware of the hazards of smoking in the woods and took precautions against fire whenever he did so, he could not remember whether he had smoked on this occasion, is sufficient to establish that the fire was caused by carelessness on the part of one of the contractor's employees.

In a proceeding under the "disputes" clause of a contract where the controversy arises out of a claim by the Government for suppression costs and damages incurred as a result of a fire alleged to have been caused by the contractor's operations, testimony by fire experts, even though they may be personnel of the agency that incurred such costs and damages, with respect to the probable cause of the fire is admissible.

Appeal of Paul C. Helmick Company, IBCA-39
(Supp.) (Aug. 21, 1958) 65 I. D. 355

CONTRACTS--Continued

SUBSTANTIAL EVIDENCE --Continued

A report of a Government inspector is admissible as evidence in a contract appeal proceeding notwithstanding that it was not prepared until the end of the day during which the events reported transpired, and that it was written up with the aid of notes made by the inspector during the course of the day which were destroyed after completion of the report.

Appeal of Flora Construction Company, IBCA-101 (Sept. 4, 1959) 66 I. D. 315

The amount of the equitable adjustment to be made on account of a "change" or a "changed condition" may be determined on the basis of a fair and reasonable approximation of costs, arrived at by a studied consideration of the record as a whole. Cost tabulations made by either party, even though there is oral testimony as to their correctness, do not afford a satisfactory basis for an equitable adjustment if major discrepancies exist between such tabulations and the cost records from which they are represented as having been derived, or if other facts or circumstances reveal the existence of major errors in them.

Appeal of Caribbean Construction Corporation, IBCA-90 (Supp.) (Sept. 22, 1959) 66 I. D. 334

A contractor, who undertook to fabricate and supply turbines for a power plant, and who seeks to excuse its delays in the performance of the contract on the grounds that its subcontractors were delayed by the occurrence of a steel strike and by work having national priority is not entitled to an extension of time for performance when it has failed to prove either of its contentions by substantial evidence. It is necessary for the contractor to show not only that the steel strike occurred but also that it was a factor responsible for delay.

Appeal of The James Leffel and Company, IBCA-205 (Oct. 8, 1959)

SUSPENSION AND TERMINATION

A claim of a contractor based on increased costs sustained as a result of an alleged suspension of work by the Government is a claim for unliquidated damages which may not be administratively allowed, notwithstanding the inclusion in the specifications of a provision relating to costs involved in suspension of work, where the contracting officer never entered a written suspension order.

Appeal of J. D. Armstrong Company, Inc., IBCA-40 (Aug. 17, 1956) 63 I. D. 289

CONTRACTS--Continued

SUSPENSION AND TERMINATION--Continued

Under a contract which gives the Government engineer authority to suspend the work in whole or in part because of "unsuitable weather," the existence of weather conditions that would justify the exercise of this authority constitutes sufficient ground for an extension of the contract performance time. Such authority may be exercised retroactively after a period of unsuitable weather has commenced or, indeed, after the period has ended.

Appeal of Urban Plumbing and Heating Company, IBCA-43 (Nov. 21, 1956) 63 I. D. 381

A contract may be terminated for the convenience of the Government even though it contains no express provision for such termination, the Government having an inherent right to terminate the contract. When a contract has been so terminated, however, the action cannot be regarded as having been taken pursuant to the "disputes" clause of the contract. Hence, the 30-day time limitation for taking appeals that exists under that clause is inapplicable, and an appeal may be considered by the Board, although it has been taken subsequent to the expiration of that period. The regulation governing the taking of appeals should be construed as permitting the consideration of such an appeal.

Appeal of D. R. Haddox, IBCA-84 (July 19, 1957)

A claim for additional compensation on the ground that the orderly sequence of the contract work was disrupted, and the performance of the work ultimately brought to a complete stop, by reason of Government delay in furnishing material as required by the contract is not allowable under the present standard form "changed conditions" and "changes" clauses, or under a "suspension of work" clause which reserves to the Government, in general terms, the right to suspend the work and states that "this right to suspend the work shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension." A claim of this character is for damages for breach of contract, and is not within the authority of administrative officers of the Government to determine pursuant to the provisions of the standard form contracts, or such a "suspension of work" clause.

Appeal of Weardco Construction Corporation, IBCA-48 (Sept. 30, 1957) 64 I. D. 376

CONTRACTS--Continued

SUSPENSION AND TERMINATION--Continued

A claim for additional compensation on the ground that contract work was delayed by reason of Government delay in furnishing material as required by the contract is not allowable under the provisions of the standard form of Government construction contract, or under the "suspension of work" clause used in Bureau of Reclamation contracts.

Appeal of Union Electric Company, IBCA-88 (Oct. 2, 1957)

A provision of the specifications under a Government construction contract for the subjugation of farmland for irrigation purposes that permits the Government to increase or decrease the quantities of work to be performed within a certain percentage limit cannot be construed as an express authorization for the termination of the contract before all the work has been completed under it. Such a provision contemplates rather that the work that is expanded or limited in accordance with its terms shall be performed by the contractor who is already engaged in the work.

Appeal of D. R. Haddox, IBCA-84 (Supp.) (Oct. 18, 1957)

When a contractor breaches a contractual guaranty, by failing to remedy faulty materials or workmanship within 1 year following the Government's final acceptance of the work, the contracting officer, under the standard form of Government construction contract, is entitled to terminate the contractor's right to proceed, to have the necessary repairs made, and to assess their cost against the contractor.

Appeal of AAA Construction Company, IBCA-55 (Nov. 26, 1957) 64 I. D. 440

Claims for costs incurred as a result of an alleged failure of the Government to make timely delivery of promised materials are not within the authority of administrative officers of the Government to allow under the form of "suspension of work" clause customarily used in Bureau of Reclamation construction contracts.

Appeal of Gustav Hirsch Organization, Inc., IBCA-147 (June 30, 1958)

CONTRACTS--Continued

SUSPENSION AND TERMINATION--Continued

Under a contract which empowers the contracting officer to suspend the work when the weather is unsuitable, or conditions are unfavorable for its suitable prosecution, the action of the contracting officer in fixing the date on which a suspension is to begin or end does not preclude the retroactive allowance of extensions of time for a period immediately preceding or following the date so fixed, if during such period no real progress on the contract work was achieved by reason of weather conditions that clearly were unsuitable or unfavorable.

Appeal of Larsen-Meyer Construction Co., IBCA-85 (Nov. 24, 1958) 65 I. D. 463

A claim of a contractor for costs incurred as a result of an alleged failure of the Government to make timely delivery of promised equipment is not within the authority of administrative officers of the Government to allow under the form of "suspension of work" clause customarily used in Bureau of Reclamation construction contracts.

Appeal of Hall-Atwater, Inc., IBCA-176 (Nov. 25, 1958)

Whatever may be the general scope of a provision in the specifications, empowering the contracting officer to suspend the work when conditions were "unfavorable for the prosecution of the work," it is clear that it cannot be held to extend to a situation that was foreseeable in view of other provisions of the specifications, which warned the contractor of the very same conditions and extended the time of performance by reason thereof.

Appeal of Reid Contracting Company, Inc., IBCA-74 (Dec. 19, 1958) 65 I. D. 500

UNFORESEEABLE CAUSES

A request for an extension of time to take care of delays in the performance of a contract that led to the assessment of liquidated damages must be denied when the contractor has failed to meet the burden of proving that an alleged labor shortage was of calculable duration and was attributable to the Korean conflict rather than to its own lack of forethought and diligence.

UNFORESEEABLE CAUSES--Continued

The record indicates that an adequate supply of labor could have been obtained if adequate advance notice had been given to the state employment agency, and adequate housing facilities had been supplied at or near the job site as required by the specifications, and hence the situation cannot be said to have been "beyond the control and without the fault or negligence of the contractor" within the meaning of Article 9 of the standard form of Government construction contract. The Board cannot find that the provisions of the specifications requiring the contractor to furnish adequate housing facilities for workers at the job site were waived by the Government in the absence of positive evidence of such a waiver. The contracting officer has entered no change order eliminating the provisions of the specifications in question, and the Board cannot indulge any presumption that he did so informally in view of the obvious need for the housing facilities. As the housing problem at or near the job site was, moreover, necessarily known to the contractor at the time it bid for the contract, it could have had no connection with the Korean conflict and cannot constitute an "unforeseeable" cause within the meaning of Article 9 of the standard form of Government construction contract.

When bids on a contract were opened on June 26, 1950, a day after the commencement of the Korean conflict, and the contract was awarded on June 29, 1950, four days later, even though the contractor was already bound by its bid when the conflict commenced, and the proportions and probable duration of the conflict were not then entirely manifest, the contractor was at least put on notice at the very beginning of the performance of the contract that difficulties in procuring labor equipment might be expected, and that early and determined efforts would be necessary if shortages were to be avoided.

Appeal of S. J. Groves & Sons Company, IBCA-8 (April 12, 1955) 62 I. D. 145

Insolvency of a subcontractor or supplier is not an unforeseeable and excusable cause of delay entitling a contractor to the benefits of an escalation clause.

Article 5 of the standard form of Government supply contract, which prevents the Government from charging the contractor with excess costs when delays are due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, is not strictly applicable in determining whether the contractor is entitled to the benefit of escalation

UNFORESEEABLE CAUSES--Continued

clause by reasons of such delays, but the provision of the contract may nevertheless be applied by analogy.

Appeal of the Pelton Water Wheel Company and Byron Jackson Company, IBCA-16 (Oct. 12, 1955) 62 I. D. 385

A claim for an extension of time for performance of a Government construction contract based on unusually severe weather conditions can be allowed only when the evidence indicates that the severe weather exceeded the average weather conditions reasonably to be expected, since such conditions are "foreseeable" and hence not excusable under the terms of article 5(c) of the revised standard form of Government construction contract.

Where counsel for the Government contends that the delay in the completion of the contract is attributable to the tardiness of the contractor in commencing and prosecuting the work under the contract rather than to weather conditions, and the record shows that the contractor delayed in commencing work for a greater number of days than the probable number of unforeseeable days of bad weather, there is serious doubt that the contractor is entitled to any extension of time at all.

Appeal of Jeneckes', IBCA-44 (Nov. 28 1955) 62 I. D. 449

Under article 5(c) of the standard form of Government construction contract (23A), the contractor is entitled to an extension of time for the performance of the contract by reason of "unusually severe weather" only when days have been lost because of the prevalence of weather so abnormal that it could not have been foreseen.

Appeal of Gila Construction Company, Inc., IBCA-46 (Dec. 20, 1955)

Where the record before the Board of Contract Appeals with respect to a claim for extensions of time by reason of various unforeseeable causes of delay contains material information that was not before the contracting officer, but where this information is not sufficient to enable the Board to determine the precise extensions of time to which the appellant may be entitled, the Board will remand the case to the contracting officer for redetermination of the merits of the claim in the light of such additional information,

CONTRACTS--Continued

UNFORESEEABLE CAUSES--Continued

any supporting proof that the appellant may choose to submit, and the comments of the Board as to the legal principles that should be applied by the contracting officer in making such redetermination.

A contractor who is directed to perform extra work after the completion date of the contract has passed is entitled to an extension of time equal to the number of days from the date the work was directed until the date when it is completed, provided the contractor has not delayed the extra work unnecessarily. The time consumed by the Government in determining the substance of the extra work to be directed is likewise excusable if the work is needed in order to correct a condition that was brought about by an error of the Government and that obstructs the orderly performance of the original contract work.

Under a contract which gives the Government engineer authority to suspend the work in whole or in part because of "unsuitable weather," the existence of weather conditions that would justify the exercise of this authority constitutes sufficient ground for an extension of the contract performance time. Such authority may be exercised retroactively after a period of unsuitable weather has commenced or, indeed, after the period has ended.

Appeal of Urban Plumbing and Heating Company, IBCA-43 (Nov. 21, 1956) 63 I. D. 381

A request for an extension of time, to avoid the assessment of liquidated damages because of delay in the performance of a contract covering the drilling of a well, must be denied when the contractor attributes such delay to difficulties encountered in completing a preceding well-drilling job. To be excusable, the delay must have been "unforeseeable" and "beyond the control" of the contractor. The existence of the previous contract could hardly be said to be unforeseeable, and its execution was subject to the control of the contractor.

Appeal of Carl W. Pistor, IBCA-81 (Dec. 27, 1956)

A strike precipitated by the decision of a contractor to discontinue paying its employees for travel time when such employees were affiliated with the union that called the strike, and it was customary for employers in the area to pay their employees for travel time, is not an unforeseeable cause of delay beyond the control and without the fault and negligence of the

CONTRACTS--Continued

UNFORESEEABLE CAUSES--Continued

contractor within the meaning of the "delays-damages" clause of the standard form of Government construction contract, and does not entitle the contractor to an extension of time for the performance of the contract so as to avoid the assessment of liquidated damages. The question whether the strike was unforeseeable and beyond the control of the contractor does not necessarily depend on a determination of the legality of the conduct of the contractor or of the union that called the strike. While it is more readily to be expected that the illegal conduct of an employer will lead to a strike, the converse of this proposition is not necessarily true, and there are many circumstances in which an employer can readily foresee that the exercise of his legal rights will lead to a strike and delay the progress of the work.

Appeal of Tri-State Construction Co., IBCA-63 (Feb. 26, 1957) 64 I. D. 38

Where a delay in the performance of the contract work is caused in part by excusable circumstances, such as the encountering of a "changed condition," and in part by inexcusable circumstances, such as a failure by the contractor to make adequate provision for overcoming known or expectable difficulties, an extension of time may be granted for so much of the total period of delay as fairly approximates the amount of time lost by reason of the excusable circumstances, even though the time so lost is not susceptible of precise determination because of the concurrent nature of the various causes of delay.

Compliance with contractual provisions requiring that the contractor exercise a high degree of care for the safety of historic buildings, users of public streets, and persons and property generally, in the vicinity of the site of the contract work, and observe municipal restrictions upon the manner in which the contract work may be done, is not in and of itself an excusable cause of delay.

A contractor who claims that the contracting officer erred in denying a request for an extension of time, whether in whole or in part, has the burden of proving the existence of facts sufficient to support the granting of such extension of time, or of so much thereof as was denied by the contracting officer.

The term "unusually severe weather" in the "excusable causes of delay" paragraph of the standard form Government contracts means only weather surpassing in severity that usually encountered or reasonably to be expected in the particular locality during the time of year involved.

Appeal of Central Wrecking Corporation, IBCA-69 (Mar. 29, 1957) 64 I. D. 145

UNFORESEEABLE CAUSES--Continued

Under a contract which provides that the United States "will not be responsible for any additional costs or delays resulting from the failure" of the Government water service at the site of the contract work, an extension of time may not be allowed for a delay caused by the fact that the water pressure was too low to enable the contractor to make valve adjustments required by the contract.

An extension of time on account of a delay in obtaining materials alleged to have been caused by a strike is not allowable in the absence of evidence indicating the extent to which the time consumed in obtaining materials exceeded the time which would have been so consumed if there had been no strike. Under a contract which provides that extensions of time on account of difficulties in obtaining materials "will apply only to the particular item and such work directly affected by such delay, and not to the entire contract," an extension of the final completion date of the contract on account of an excusable difficulty in obtaining materials is not allowable in the absence of evidence that such difficulty, rather than a lack of diligence by the contractor in prosecuting portions of the job not dependent upon receipt of the materials, was the real cause of the failure to complete the contract work on time. An extension of time on account of a delay in obtaining materials caused by a strike that had been long in existence when the contract was made is not allowable in the absence of evidence that the delay was caused by circumstances, relating to the period after the contract was made, which the contractor could not reasonably have anticipated when the contract was made, and which were beyond his control.

Appeal of Elmer A. Roman, IBCA-57 (June 28, 1957)

When from the reported circumstances in documents in the appeal file, it may be inferred that two hurricanes, each of which lasted approximately 1 day, caused difficulties that delayed the work by approximately 2 days in the aggregate, such delay was excusable and the contractor is entitled to an extension of the time for performance of 2 days.

Appeal of AAA Construction Company, IBCA-55 (Nov. 26, 1957) 64 I. D. 440

Failure by a contractor to prosecute the contract work with the efficiency and expedition required for its completion within the contract time does not, in and of itself, disentitle the contractor to extensions of time for such parts of the ultimate delay in completion as are

UNFORESEEABLE CAUSES--Continued

attributable to events, such as acts of the Government or strikes, that are excusable under the terms of the contract.

Under the "disputes" clause of the standard-form Government construction contracts, the contracting officer has the responsibility of apprising the contractor of the basis for his decision, and under the "delays-damages" clause, he has the further responsibility of making findings of fact with respect to the circumstances and extent of alleged excusable causes of delay.

The presence in a contract of specifications that necessitate reference to the catalogs of various dealers in order to identify the types, styles and sizes of required articles constitutes an excusable cause of delay if the specifications are ambiguous, by reason of such circumstances as the use by a named dealer of the same number to designate different articles in different catalogs, but not if the specifications are unambiguous.

The issuance by authorized Government personnel of instructions or requests that progress of the contract work be held up while consideration is being given to the advisability of making changes in the specifications constitutes an excusable cause of delay.

Delays in the completion of a building caused by the issuance of Government purchase orders that necessitate deferment of completion of the building until the articles specified in the orders can be procured and installed are excusable.

Appeal of Chas. I. Cunningham Co., IBCA-60 (Dec. 6, 1957) 64 I. D. 449

A tunneling contractor seeking an additional extension of time to cancel an assessment of liquidated damages on the ground that it had to remove the tunnel inverts in winter weather by reason of delays of the Government in procuring steel must be denied relief when it appears that the Government's delay actually gave the contractor a more favorable period of performance than it would have had if the delay had never occurred, and the contractor has not shown that it encountered during the period of performance "unusually severe weather" or other excusable causes of delay within the meaning of the "delays-damages" provision of the U. S. standard form of Government construction contract. On the contrary, the record shows that the causes of delay, far from being excusable, were the fault of the contractor.

Appeal of J. A. Terteling & Sons, Inc., IBCA-27 (Dec. 31, 1957) 64 I. D. 466

CONTRACTS--Continued

UNFORESEEABLE CAUSES--Continued

Notwithstanding the occurrence of a storm which constituted "unusually severe weather" within the meaning of the delays-damages provision of the contract, and which damaged the excavation work of the contractor, it was not entitled to an extension of time for restoring the excavation when during the period when the restoration could have been accomplished, it could have made no progress due to its failure to have delivered to the job site the main anchor beam and erector anchor bar without which concrete could not have been poured. To be entitled to an extension of time the contractor must show not only that an excusable cause of delay occurred but also that it was a factor in the ultimate delay in the completion of the work. The contractor is entitled, however, to an extension of time for 2 days which were required by the contractor to do the extra concrete and form work necessitated by the storm, notwithstanding shortcomings in the concrete work that had to be remedied, since it would undoubtedly have completed all of the concrete work 2 days earlier if the storm had not occurred.

Appeal of Younger Bros., Inc., IBCA-148
(May 28, 1958) 65 I. D. 238

Under the standard-form "excusable causes of delay" provision, a delay in delivering equipment is not excusable on the ground that the contractor learned from Government sources of a deferment of the construction of the plant in which the equipment was to be installed, and assumed that by reason of such deferment the Government would not require it to make delivery within the time specified in the contract.

Appeal of Fairbanks, Morse & Co., IBCA-146
(Aug. 11, 1958) 65 I. D. 321

A claim of a contractor for an extension of time based on the theory that the Government was obligated to notify it immediately of the award of the contract must be rejected when under the terms of the bid form the Government was allowed 60 days to accept or reject the bid, and notification was given long before the expiration of this period. Moreover, since bids are opened publicly, the contractor could readily have ascertained whether it was the successful bidder.

A claim of a contractor for an extension of time based on delay in securing performance and payment bonds, due to the unexpected liquidation of its bonding company, must be denied, even if it be assumed for the sake of argument that this event was unforeseeable, when it is wholly speculative whether the delay actually made any difference to the contractor.

CONTRACTS--Continued

UNFORESEEABLE CAUSES--Continued

Even if the contractor had been able to obtain the bonds sooner, it does not follow that it would necessarily have been given notice to proceed any earlier than it was given. Moreover, the contractor has not shown that it would have obtained a more favorable performance period if the delay had not occurred.

A contractor who is entitled to an extension of time for performance by reason of such an unforeseeable cause as "unusually severe weather" is nonetheless entitled to such relief, despite the fact that its progress schedule, which it was required by the specifications to furnish to the Government merely for the latter's information, may have indicated that no work was originally scheduled during part of the period when the unusually severe weather occurred.

A contractor is not entitled to an extension of time for performance on the ground that the Government required the installation of a different type of pump than that designated in the specifications when there is no showing that either type of pump, the delivery of which would have required from 60 to 90 days, would have arrived on the job at the time of its contemplated installation.

Appeal of Black Hills Ditching Co., Inc.,
IBCA-145 (Aug. 15, 1958) 65 I. D. 342

The unusualness of the weather on a stormy day cannot be determined merely by measuring the severity of the weather on that particular day against the average weather for the same day in prior years, but must be determined on a basis that takes account of the frequency with which days of like or greater severity occurred during the same months or seasons of prior years.

The contingency that some event of local public interest will cause a temporary increase in traffic on a road under improvement is one so apt to happen that it would normally be allowed for in a road contractor's pre-bid traffic estimate, and, therefore, such an occurrence does not constitute an unforeseeable cause of delay even though the particular event that causes the traffic increase is one which, although annual, has neither a fixed date nor a fixed site.

A contractor who seeks an extension of time under a standard form construction contract because of an alleged excusable cause of delay has, in general, the burden of proving that the alleged cause of delay actually existed, that it met the criteria of excusability prescribed by the contract, that it delayed the orderly progress or ultimate completion of the contract work as a whole, and that it did so for a given period of time.

Appeal of Larsen-Meyer Construction Co.,
IBCA-85 (Nov. 24, 1958) 65 I. D. 463

CONTRACTS--Continued

UNFORESEEABLE CAUSES--Continued

When a contractor has established that the weather was "unusually severe" within the meaning of the "delays-damages clause" of the standard form of Government construction contract, it is not disentitled to an extension of time merely because the days claimed are not consecutive and amount to but a small percentage of the contract performance time.

Appeal of Reid Contracting Company, Inc., IBCA-74 (Dec. 19, 1958) 65 I. D. 500

Failure by a contractor to commence work within the time prescribed by the contract does not, in and of itself, disentitle the contractor to extensions of time on account of events, such as unusually severe weather, that are excusable under the terms of the contract and that occur while he is engaged in active prosecution of the contract work. Thus, a contractor engaged in the installation of a series of irrigation structures is entitled to an extension of time on account of soggy soil conditions that seriously impeded the delivery of ready-mix concrete to the structure sites, and that were brought about by unusually severe weather which had the twin effects of deferring the spring thaw beyond its usual time and of intensifying and prolonging its consequences, notwithstanding the fact that he had deferred operations until the spring in order to avoid the adverse working conditions normally prevailing during the winter months.

Appeal of J. W. Merz, IBCA-64 (Mar. 10, 1959)

Bridge construction contractors, who were required to paint the steel work of the bridges constructed by them and who were delayed in the completion of the work due to their inability to identify the proper types of paint required by the specifications, are not entitled to an extension of time for performance when it appears that the paint types were sufficiently identifiable by reference to specifications of the American Association of State Highway Officials.

Appeal of Cox and Haddox, IBCA-155 (Mar. 26, 1959) 66 I. D. 97

The provision in the standard-form construction contract that the contractor shall at his own expense "obtain all licenses and permits required for the prosecution of the work" does not impose upon a contractor, whose undertakings include installing sanitary plumbing on Government property and connecting such plumbing with a county sewer, the responsibility for paying a charge assessed by the county for the use to be made of the sewer by the Government, nor for solving the impasse created by a conflict between the plumbing specifications of the contract and the county plumbing code. Refusal by the county to issue

CONTRACTS--Continued

UNFORESEEABLE CAUSES--Continued

a permit for the connection save upon condition that such charge be paid and that the specifications be altered to conform to such code constitutes an excusable cause of delay under the standard-form "delays-damages" clause.

Appeal of James C. Christopher, d/b/a Christopher Construction Company, IBCA-109 (Mar. 31, 1959) 66 I. D. 117

Although the "disputes" clause of the U. S. standard form of construction contract provides that in connection with an appeal the contractor shall be afforded an opportunity to offer evidence in support of its appeal, and the regulations governing procedure before the Board provide for a hearing if the appeal involves disputed issues of fact, they contemplate that a hearing for the purpose of taking testimony shall be mandatory only when appellant has tendered issues of fact that are genuine and material. Hence, a request for a hearing made by a contractor engaged in constructing an access road to a Bonneville transmission line who pleads no excusable cause of delay but attacks the validity and effect of the liquidated damages provision itself need not be granted, and the appeal may be decided on the written record. In particular, no genuine and material issue of fact is raised by the allegation that unnamed Bonneville inspectors assured the contractor that there was no urgent need for the access road, since such assurances would be unauthorized even if made, and hence could not form the basis for a waiver of the liquidated damages provision. The fact that the liquidated damages imposed on the contractor exceeded the amount of the consideration for the performance of the work is in itself immaterial.

Appeal of Parker-Schram Company, IBCA-96 (Apr. 7, 1959) 66 I. D. 142

A happening caused by an employee of a subcontractor, which could be neither expected nor anticipated by either the prime contractor or the subcontractor, constitutes an unforeseeable cause within the meaning of Clause 5 of U. S. Standard Form 23-A.

Appeals of Olson Electric Company, IBCA-137, IBCA-138 (Dec. 28, 1959)

CONTRACTS--Continued

WAIVER AND ESTOPPEL

Where a contractor, who is liable to the Government for corrective work performed by another contractor, voluntarily and with full knowledge of the facts constituting the basis for charges for the work enters into a settlement with the other contractor, such settlement constitutes an accord and satisfaction. Such settlement cannot be avoided because the contractor might have entered into the settlement reluctantly, or to avoid the trouble and expense of an administrative determination of fact and a possible appeal therefrom and litigation, or because the Government, an interested third party, urged such a settlement, and withheld the sum of $5,000 otherwise due the contractor, pending determination of the amount chargeable to the contractor for the corrective work.

Appeal of Southwest Welding and Manufacturing Company, IBCA-33 (June 29, 1955)
62 I. D. 257

If a contracting officer or any other officer of the Government had intended to waive the defense based on the change order, he would lack authority to do so in the absence of a new and valuable consideration moving to the Government, it being well-settled that Government officers may not modify a contract when it is to the disadvantage of the Government to do so.

Appeal of Sam Bergesen, IBCA-11 (Aug. 1, 1955)
62 I. D. 295

Where a contract provided for an extension of time in case solid rock should be encountered by the contractor in the drilling of a well but also required immediate notice to be given to the contracting officer of the existence of any such condition, the failure of the contractor to comply with this procedural requirement bars consideration on the merits of a request for an extension of time. Even assuming that the procedural requirement could have been waived by the contracting officer, his mere silence cannot be construed as a waiver in the circumstances of this case.

Appeal of Carl W. Pistor, IBCA-81 (Dec. 27, 1956)

The Board of Contract Appeals will not reject a claim for an extension of the performance time of a contract because of want of proof that the contractor has complied with an applicable notice requirement of the contract if such requirement is one that is subject to waiver, and if no authorized representative of the Government has asserted that the contractor

CONTRACTS--Continued

WAIVER AND ESTOPPEL--Continued

failed to give timely notice or has asked that compliance with the notice requirement be proved by the contractor.

Appeal of Central Wrecking Corporation, IBCA-69 (Mar. 29, 1957) 64 I. D. 145

When a contracting officer has invoked the protest requirements of the specifications as a bar to the allowance of a contractor's claims, although he has also commented unfavorably on the merits of the claims, and the contractor has failed either to comply with protest requirements of the specifications or to present any argument or circumstance justifying a waiver of such requirements, its claim for additional compensation because of alleged additional work must be denied.

Appeal of R. V. Lloyd & Company, IBCA-143 (Feb. 12, 1958)

The failure of a contractor to give timely notice of a claim is waived when the contracting officer considers the claim on its merits without invoking such failure as a reason for its denial.

Appeal of J. W. Merz, IBCA-64 (Mar. 10, 1959)

Although the "disputes" clause of the U. S. standard form of construction contract provides that in connection with an appeal the contractor shall be afforded an opportunity to offer evidence in support of its appeal, and the regulations governing procedure before the Board provide for a hearing if the appeal involves disputed issues of fact, they contemplate that a hearing for the purpose of taking testimony shall be mandatory only when appellant has tendered issues of fact that are genuine and material. Hence, a request for a hearing made by a contractor engaged in constructing an access road to a Bonneville transmission line who pleads no excusable cause of delay but attacks the validity and effect of the liquidated damages provision itself need not be granted, and the appeal may be decided on the written record. In particular, no genuine and material issue of fact is raised by the allegation that unnamed Bonneville inspectors assured the contractor that there was no urgent need for the access road, since such assurances would be unauthorized even if made, and hence could not form the basis for a waiver of the liquidated damages provision. The fact that the liquidated damages imposed on the contractor exceeded the amount of the consideration for the performance of the work is in itself immaterial.

Appeal of Parker-Schram Company, IBCA-96 (Apr. 7, 1959) 66 I. D. 142

CONVEYANCES

GENERALLY

Where through a mutual mistake of the parties a tract of land in a conveyance is incorrectly described, in equity the grant will be held effective as to the tract which the parties intended to convey.

Leasing of Property Along the Intracoastal Canal in T. 15 S., Rs. 1 and 2 E., La. Mer., Louisiana, M-36462 (Aug. 14, 1957) 64 I. D. 327

INTEREST CONVEYED

Where the United States quitclaims to private persons the mineral rights (excepting and reserving only coal) in acquired lands on which oil and gas leases are outstanding and the quitclaim deed does not except or reserve to the United States any right or interest as lessor under the oil and gas leases, the Department retains no jurisdiction over the mineral interests covered by the leases and after execution and delivery of the deed, the grantees of the United States become the lessors of the oil and gas leaseholds.

Godfrey Nordmark, A-27602 (July 21, 1958) 65 I. D. 299

DELEGATION OF AUTHORITY

GENERALLY

The President's authority under the Defense Production Act with respect to priorities and allocations has, with respect to helium, been delegated to the Secretary of the Interior, subject to certain limitations, and can be redelegated by the Secretary of the Interior to any official or agency of the Federal Government, including the Bureau of Mines.

Whether Authority Exists for Operating a Priorities and Allocation System for Helium Among Federal Agencies and Private Users, and What Delegations Would be Required to Enable the Bureau of Mines to Exercise Such Authority, M-36299 (Aug. 22, 1955) 62 I. D. 323

DELEGATION OF AUTHORITY--Continued

AUTHORITY TO MAKE

The Secretary, under Reorganization Plan No. 3 of 1950, may assign to the Director of the Geological Survey the entire function of issuing regulations and fixing prices governing the sale of publications under 43 U. S. C. sec. 42.

Prices of Geological Survey Maps, M-36399 (Jan. 3, 1957)

REDELEGATIONS

The appeal of a contractor from the decision of a contracting officer assessing liquidated damages against the contractor by reason of the late completion of the work cannot be considered on the merits when the contractor failed to give the contracting officer notice of the causes of the delay as required by Article 9 of the standard form of Government construction contract. The consideration of the causes of delay by the contracting officer on the merits does not amount to a waiver of the requirement of notice, since the contracting officer could extend the time for giving notice only with the approval of the head of the Department. Although the head of the Department had delegated to the heads of bureaus the authority to extend the time for giving notice, and had authorized them to redelegate the authority to their subordinates by order published in the Federal Register, no effective redelegation was accomplished in this case, since the Commissioner of Reclamation authorized his contracting officers to extend the time for giving notice by means of an unpublished instruction in the Bureau of Reclamation manual.

Appeal of S. J. Groves & Sons Company, IBCA-8 (April 12, 1955) 62 I. D. 145

DESERT LAND ENTRY

GENERALLY

Where subsequent to a decision of the Director of the Bureau of Land Management requiring an applicant for desert land entry on lands classified as prospectively valuable for oil and gas to amend his application so as to include only 160 acres pursuant to a statute which limits desert land entries on lands classified as valuable for minerals to 160 acres in area, the statute is amended to eliminate the 160-acre limitation, the case will be remanded

DESERT LAND ENTRY--Continued

GENERALLY--Continued

to the Bureau for further action on the application in light of the removal of the 160-acre limitation.

Jean Francis and Wilbur Ray McNinch et al., A-27148, A-27154, A-27155 (July 25, 1955)

The effective date of a period of suspension under Public Law 834 (act of July 30, 1956; 70 Stat. 715) is either (1) the date that notice is received from the entryman that he has suspended cultivation and improvement operations or (2) the date indicated by the entryman in his notice that he intends in the future to suspend such operations. The notice must contain a statement expressing the desire to suspend operations, information concerning cultivation and improvements on the entry, and a grant to the United States of a right to enter and occupy the land.

The anniversary date for filing annual proof after period of suspension will be determined by extending the previous anniversary date by an amount of time equal to the approved period of suspension.

Interpretation of Public Law 834 (Act of July 30, 1956; 70 Stat. 715), M-36469 (Sept. 16, 1957)

In order for one to be entitled to the preference right of entry on desert land conferred by the act of March 28, 1908, he must comply with all requirements of the pertinent regulation for reclamation or occupancy and cultivation of the land up to the time of filing of the plat of survey of the land.

Marion M. Pontius, A-27473 (Nov. 7, 1957)

Where on appeal to the Secretary of the Interior a desert land applicant requests permission to go onto the land embraced in his application for the purpose of proving the existence of necessary irrigation water, a special use permit may be issued for such purpose at the discretion of the Secretary.

Jack B. Aldridge, Ina D. Aldridge, A-27520, A-27559 (Mar. 12, 1958)

Where, contrary to an area classification report and a field report, some evidence is submitted for desert land applicants that there is a possibility of obtaining sufficient quantities of water to irrigate lands included in their

DESERT LAND ENTRY--Continued

GENERALLY--Continued

desert land applications, special land use permits may be issued to allow the applicants to go on the land and drill for water in order to show that the land may be properly classified as suitable for desert land entry.

Eric W. Erickson et al., A-27579 (July 3, 1958)

When land within a desert land entry is reported to be prospectively valuable for oil and gas before the entryman submits final proof, it is proper to require the entryman to file consent to a reservation to the United States of the oil and gas covered by the entry or to contest the mineral classification of the land.

Allien M. Whitsett, Jr., and William J. Ripling, A-27611 (Sept. 15, 1958)

Applications for desert land entries in an area commonly regarded as dry and with insufficient ground water obtainable at reasonable cost will not be allowed until the applicants have actually drilled wells and submitted evidence of an adequate supply of irrigation water.

Filemon O. Fuentes, Fred D. Kyle, Jr., A-27719 (Nov. 13, 1958)

An application for desert land entry in an area commonly regarded as lacking in sufficient ground water of suitable quality for irrigation will not be allowed until the applicant has actually drilled a well and submitted evidence of an adequate supply of suitable irrigation water.

Temple Simmons, A-27864 (Feb. 17, 1959)

Where a desert land entryman applied for purchase of his entry under the act of March 4, 1915, it was not appropriate to suspend the entry under the Maggie L. Havens (A-5580, Oct. 11, 1923) case rather than to cancel the entry upon the entryman's failure to comply with the requirements of the 1915 act.

An application for reinstatement of a desert land entry presented 26 years after proper cancellation and without showing of any equities in the applicants which could justify reinstatement is properly rejected.

Harley G. Ball et al., A-27942 (Jun. 15, 1959)

DESERT LAND ENTRY--Continued

GENERALLY--Continued

Where on appeal to the Secretary of the Interior from the rejection of desert land applications because of a lack of a showing as to the existence of sufficient irrigation water, the applicants present evidence tending to show the possibility of the existence of sufficient underground water, special use permits may be issued for the purpose of drilling wells on the lands provided the applicants' applications meet the requirements of the regulations.

Rockwell A. Davis, Pedro O. Garcia, A-28071, A-28081 (Oct. 28, 1959)

APPLICANTS

A desert land application in which the applicant states that he is a bona fide resident of the State in which the land applied for is located will not be refused allowance on the ground that he is not a bona fide resident of the State merely because the applicant used the address of his attorney-in-fact for his mailing address and a junior applicant could not make personal service there on the senior applicant.

Hattie M. Fults, Ernest Maloof, A-27509 (Nov. 19, 1957)

APPLICATIONS

When an application to make desert land entry is unaccompanied by the payment of 25 cents per acre for the land applied for, the manager is under no duty to notify the applicant that his application initiates no right to the land.

An application to make desert land entry on land within an irrigation district should not be rejected upon the failure of the applicant to furnish, within a specified time, a certificate from the district that there are no unpaid charges against the land where it is shown that the applicant has done everything in his power to obtain the certificate and that his failure is attributable to actions of the land office and to a protest lodged against the allowance of the application rather than to any lack of diligence on the part of the applicant.

It is proper to suspend an application to make desert land entry on land within an irrigation district subject to the act of August 11, 1916, for a period of 30 days in order that the

DESERT LAND ENTRY--Continued

APPLICATIONS--Continued

applicant may present a certificate from the district showing that there are no unpaid charges against the land.

Charles Schoenburg, Wilma I. Claverie, A-27434 (June 3, 1957)

An otherwise proper desert land application is not subject to rejection on the ground it was falsified because part of the land applied for was in fact improved and occupied when the evidence is persuasive that only a fraction of the land may have been cultivated in the past and that at the time the applicant inspected the land there was no evidence of recent cultivation.

A junior desert land application should be suspended rather than rejected on the ground that an allowable senior desert land application has been filed pending the allowance or other final disposition of the senior application.

There is no requirement that a desert land applicant inspect the land within 10 days of filing his application.

Hattie M. Fults, Ernest Maloof, A-27509 (Nov. 19, 1957)

Where a desert land applicant whose application has been rejected does not object to the rejection but requests the Bureau of Land Management to reinstate his application, and does not object to an announced drawing for the purpose of determining priority between his reinstated application and a conflicting application, his application loses whatever priority it afforded him prior to its reinstatement and he cannot be heard to complain--after the drawing is held and the conflicting application for the same land is given priority--that his application was in good standing and did not need reinstatement and that a drawing was not necessary.

Dianne L. Somsen, Lalovi L. Butler, A-27514 (Jan. 20, 1958)

Desert land applications may not be allowed unless all of the evidence required by applicable departmental regulations is submitted.

Eric W. Erickson et al., A-27579 (July 3, 1958)

DESERT LAND ENTRY--Continued

APPLICATIONS--Continued

Approval of an application for desert land entry does not give the applicant a vested right to patent; his right remains inchoate until he has fully complied with the law entitling him to patent.

Allien M. Whitsett, Jr., and William J. Ripling, A-27611 (Sept. 15, 1958)

The filing of an application for desert land entry confers upon the applicant no rights or interest in the land which precludes the withdrawal of the land for stock driveway purposes.

Fern Hill Hunter, A-27756 (Jan. 13, 1959)

An application to amend a desert land entry is properly rejected where the entry sought to be amended has been canceled and closed at the time the amendment application is filed.

Loyd J. Hammons, A-27925 (May 19, 1959)

Where successive applications for desert land entry on the same land are filed and an entry is allowed on the first application but is subsequently canceled because the entryman was not entitled to make the entry, it is erroneous to reject the second application for entry on the ground that the second applicant lost his rights under his application upon the allowance of the first application; he loses such rights only if the allowance of the entry on the first application was proper. Ohmer V. Hensel, 45 L. D. 557 (1916), and James R. Gwyn, A-26806 (December 17, 1953), distinguished.

Alfred Donaldson Trotter, Sr., A-27981 (July 21, 1959) 66 I. D. 275

The filing of an application for desert land entry gives the applicant no rights or interest in the land, and a desert land application was properly rejected where, after the application was filed, the land was withdrawn from appropriation under the public land laws and reserved for use by the Atomic Energy Commission.

Frances M. Williams, A-28034 (Aug. 20, 1959)

DESERT LAND ENTRY--Continued

CANCELLATION

The Department is without authority to arbitrarily cancel valid unperfected desert land entries which have been properly though inadvertently allowed.

Construction of the Act of May 7, 1954 (68 Stat. 78), Directing Issuance of Patents To The State of Idaho for Certain Carey Act Lands, M-36255 (Jan. 10, 1955)

The report of a field examination, although a proper basis for charges, notice, and a hearing, is not evidence on which the final action of cancellation of a desert land entry may be taken.

A desert land entry is not to be canceled for defects not appearing on the face of the record without giving the entryman an opportunity to be heard.

Claude E. Crumb, A-26930 (Mar. 21, 1955) 62 I. D. 99

An application for reinstatement of a canceled desert land entry is properly rejected where the entry was canceled for failure of the entryman to perform his first year's annual proof work during the first year, and where an intervening desert land application for the same lands has been filed.

John P. Lawler, Erna S. Lawler, A-27731 (Nov. 6, 1958)

CLASSIFICATION

An application for desert land entry will be rejected where the land applied for consists of bottom land, which is subject to periodic flooding and is excellent pasture land, and alluvial outwash, which is rough and gravelly, and the land applied for is valuable for fishing and other recreational uses.

Robert Dale Scarrow, A-27023 (Jan. 11, 1955)

Applications for homestead and desert-land entry will be remanded for a further field examination where there is insufficient evidence in the record regarding the suitability of the lands applied for for agricultural development.

Elmer Richard Wright et al., A-27020 et al. (Feb. 28, 1955)

DESERT LAND ENTRY--Continued

CLASSIFICATION--Continued

Applications for desert land entry are properly rejected where there is substantial evidence that the land applied for is not suitable for the sustained cultivation of crops, there is considerable doubt that reclaiming the land is feasible, and disposition of the land pursuant to private exchange and public sale applications appears to be in the public interest.

Helen C. Smith et al., A-26968, A-26969 (Mar. 4, 1955)

It is proper to refuse to classify land for desert land entry where the existence of an adequate supply of irrigation water to reclaim the land is not shown and there is a critical water shortage in the area in which the land is situated.

William E. Gelder, A-27084 (April 12, 1955)

An applicant for a desert land entry is not entitled as a matter of right to a hearing to determine the proper classification of the land applied for.

Applications for desert land entry will be remanded for further consideration where information in the record indicates that the land applied for, which has been classified as unsuitable for agricultural development on the basis of a general area classification, may be suitable for such development as a result of possible agricultural success on land in the same general area containing the same soil type; and there is no record of any soil tests of the individual tracts applied for which confirm the general classification.

Leonard E. Noren, Harry C. Perry, A-27147 (Aug. 1, 1955)

Applications for desert land entry will be remanded for further field examination where there is insufficient evidence in the record regarding the suitability of the lands applied for for agricultural development.

Charles C. Bogardus, Vera L. Bogardus, A-27219 (Nov. 23, 1955)

It is proper to refuse to classify land for desert land entry where it appears that the probable depths to water exceed the depth at which it is economical to pump water and where all available water in the area should be considered obligated by lands having an economic pump lift.

Elizabeth Bullard et al., A-27242 (Dec. 28, 1955)

DESERT LAND ENTRY--Continued

CLASSIFICATION--Continued

Where lands applied for under the Desert Land Act are classified as unsuitable for agricultural production because of unfavorable topography of the lands applied for, the classification will not be disturbed in the absence of positive evidence that the classification is erroneous.

Mary Refugio Jackson et al., A-27236, A-27237 (Feb. 29, 1956)

An application for desert land entry will be rejected where the land applied for is subject to severe flooding, is too rough and irregular to be suitable for cultivation, and does not appear to contain sufficient acreage suitable for cultivation to meet the minimum cultivation requirements of the desert land law.

Lucille Charlotte Edgerton, A-27261 (Mar. 1, 1956)

Applications for desert land entry will be remanded for further field examination where there is inconclusive evidence in the record regarding the suitability of the lands applied for for agricultural development.

Bernard Ray Evans et al., A-27244 (Mar. 12, 1956)

To justify a classification of land as suitable for desert land entry, there must be a showing that water is available to the land for its reclamation.

Walter E. Scott, A-27293 (June 21, 1956)

Where lands applied for under the Desert Land Act are classified as unsuitable for agricultural purposes because of the high alkali content of the soil plus the extremely poor quality of the water available for irrigation in the area, the classification will not be disturbed in the absence of positive evidence showing that the classification is erroneous.

Doris E. Wickman, William B. Clary, A-27324 (July 13, 1956)

Desert land and homestead applications are properly rejected where the lands applied for are later included in a declared underground water basin in which further appropriations of underground water for irrigation, municipal and industrial purposes is forbidden under State law.

DESERT LAND ENTRY--Continued

CLASSIFICATION--Continued

Such action is proper even though some of the applicants have applications pending with the State Engineer for permits to appropriate underground water, which permits may have to be granted under State law.

Where desert land and homestead applications are rejected by the Director, Bureau of Land Management, on the basis of a finding that there is insufficient ground water available for the development and reclamation of the lands applied for, and it is shown on appeal to the Secretary of the Interior that there is sufficient water for some of the applications, the entries will be allowed if other requirements are met.

Marvin P. Mitchell et al., A-27263 (Mar. 5, 1957)

It is proper to refuse to classify lands for desert land entry where it is shown that the soil and topography of the lands applied for are such that the lands are unfit for cultivation.

It is proper to refuse to classify lands for desert land entry where it is shown that the applicants intend to rely on percolating water for the irrigation of the lands and where it is shown further that there is no percolating water in the groundwater basin surplus to the needs of the private landowners in the basin.

Ruby D. Moore et al., A-27346 (May 14, 1957)
64 I. D. 137

It is proper to refuse to classify land as suitable for desert land entry where no adequate showing has been made that water is available for the reclamation of the land.

Andrew T. Johnson et al., A-27305 (Sept. 25, 1957)

Where the land is classified as unsuitable for desert land entry on the ground that allowance of further entries in the area would jeopardize the water rights of existing desert land entrymen, and it is shown on appeal that most of the entries previously allowed have been canceled, the case will be remanded for further consideration.

Charles L. Wallace et al., A-27506 (Dec. 12, 1957)

DESERT LAND ENTRY--Continued

CLASSIFICATION--Continued

Where applications for desert land entry were rejected only because water was not available to reclaim the land, but the applicants are given 18 months time within which to submit evidence that the necessary water is available, the land may be classified as suitable for desert land entry contingent upon the applicants submitting evidence of availability of water within the required time.

Eric W. Erickson et al., A-27579 (July 3, 1958)

Where lands applied for under the Desert Land Act are classified as unsuitable for agricultural production because of poor soils, lack of water, etc., the classification will not be disturbed in the absence of positive and substantial evidence that the classification is erroneous.

Daniel T. Pecnik et al., A-27582 (July 9, 1958)

Desert land applications are properly rejected where the lands applied for are embraced in a grazing district reseeding project and where allowance of the entries would destroy the project and seriously disrupt livestock operations in the area.

Richard J. Bostrom, Fred H. Winters, A-27618 (Aug. 27, 1958)

A desert land entry may be allowed even though protions of the land are rough, if enough of the remaining portions can be made fit for cultivation by leveling and terracing.

Where the soils in land embraced in a desert land entry application have been classified as unsuitable for agricultural production on the basis of a visual examination only, without the benefit of the analysis of soil samples, and the applicant submits a competent soil analysis of samples taken from the land which contradicts the visual examination, the visual examination must give way to the favorable specific soil analysis.

Eryl A. Cummings, Keith J. Davidson, A-27647 (Aug. 27, 1958)

Where land may be properly classified for either homestead or desert land entry and an application for homestead entry is filed before the filing of a conflicting desert land application, the classification of the land for homestead entry will not be modified in the absence of evidence that the classification is incorrect.

W. E. Buell, A-27700 (Oct. 27, 1958)

DESERT LAND ENTRY--Continued

CLASSIFICATION--Continued

A desert land application is properly rejected where the land applied for has been classified as suitable for disposition under the Small Tract Act and the highest and best use of the land is for small tract purposes.

John L. Johnson, A-27695 (Nov. 17, 1958)

Homestead and desert land applications are properly rejected when the lands applied for are included in a reseeding project and allowance of the entries would destroy the project and violate the pledge of the United States to cooperate with the State wherein the lands are located for the duration of the reseeding project.

Don L. Wilson, Rodney Eugene Wilson, A-27723 (Dec. 12, 1958)

Applications for desert land entry are properly rejected where there is no adequate showing that water is available for the reclamation of the land.

Dale K. Isaacs, Judy L. Dunklin, A-27774 (Dec. 12, 1958)

A protest by grazing users against the allowance of desert land entries will be denied where it appears that the land will be suitable for desert land entry if sufficient water for irrigation can be found.

Fern Hill Hunter, A-27756 (Jan. 13, 1959)

When lands applied for under the Desert Land Act are classified as unsuitable for agricultural production because of shallow soils underlain with caliche and lack of irrigation water supply, the classification will not be disturbed in the absence of substantial evidence that the classification is erroneous.

Juan M. Beltran et al., A-27808 (Feb. 3, 1959)

Classification of land covered by a desert land application as unsuitable for agricultural production because of unfavorable topography, soil, and water supply will not be disturbed in the absence of positive evidence that the classification is erroneous.

Lawrence R. Aker, A-27815 (Feb. 13, 1959)

DESERT LAND ENTRY--Continued

CLASSIFICATION--Continued

An application for desert land entry is properly rejected when the applicant fails to show that classification of the land applied for as suitable for development under the Small Tract Act is erroneous; the fact that his application was filed prior to the small tract classification gives him no right to have the land classified for desert land entry.

Adeeb G. Thomas, A-27818 (Feb. 17, 1959)

An application for desert land entry is properly rejected when there is no satisfactory evidence that water is available to irrigate the land.

June C. Keane, A-27847 (Feb. 17, 1959)

Applications for desert land entry are properly rejected where the lands applied for are unsuitable for agricultural development because of inferior soils and where the available water is scarcely sufficient for irrigating the lands in the area which contain good soils for agricultural development.

Dottie J. Beck et al., A-27884 (Mar. 5, 1959)

Where a desert land application is rejected on the ground that the lands applied for are non-agricultural in character, and upon review of the record the Director, Bureau of Land Management, concludes that the lands are suitable for agricultural development, it is proper, nevertheless, to remand the case for further consideration of the relative merits of desert land development where the lands are situated in a proposed reseeding project.

Ross C. Osborn, Virgil B. McFall, A-27862 (Mar. 31, 1959)

Classification of land covered by a desert land application as unsuitable for cultivation because of insufficient annual replenishment of the ground water table will not be disturbed in the absence of positive evidence that the classification is erroneous.

Pearl Y. Hogle et al., A-27889 (Apr. 23, 1959)

Applications for desert land entry are properly rejected where there is no adequate showing that water is available for the reclamation of the land.

Horace H. and Norma J. Neely, A-27890 (Apr. 27, 1959)

DESERT LAND ENTRY --Continued

CLASSIFICATION--Continued

A desert land application is properly rejected in part where the land involved is shown to be unsuitable for agricultural development.

Dorothy J. Phillips, A-27874 (May 19, 1959)

An application for desert land entry is properly rejected when there is no satisfactory evidence that water is available to irrigate the land.

Nels L. Swenson, A-28024 (Aug. 20, 1959)

Desert land applications are properly rejected where, after 2 years of occupancy under special land use permits granted for the purpose of showing the existence of necessary irrigation water, the applicants have failed to show that sufficient irrigation water exists on the lands.

Joseph D. and Violet C. Swenson, A-28028 (Aug. 21, 1959)

In the absence of positive evidence of an adequate supply of water for irrigation purposes, land is properly classified as unsuitable for entry under the Desert Land Act.

Merwin D. McKinlay et al., A-28082 (Aug. 24, 1959)

In the absence of positive evidence of an adequate supply of water for irrigation purposes, land is properly classified as unsuitable for entry under the Desert Land Act.

Marie L. Jenkins, Virginia M. Ohrt, A-28089 (Aug. 25, 1959)

An application for desert land entry is properly rejected when there is no satisfactory evidence that sufficient water is available to irrigate the land.

Inez Ruth Stevens et al., A-27990, A-28054 (Aug. 28, 1959)

Applications for desert land entry are properly rejected where the lands applied for are topographically unsuitable for agricultural production or lie within the floodway of a river and are subject to periodic flooding.

Ralph G. and Kathleen Myers, A-28087 (Oct. 15, 1959)

DESERT LAND ENTRY --Continued

CLASSIFICATION--Continued

An application for desert land entry is properly rejected when the land applied for has been classified as unsuitable for agricultural development and the applicants present no evidence which requires a change in such classification.

Harold B. Anderson, Jr., et al., A-28066 (Nov. 20, 1959)

The classification of lands described in an application for desert land entry as unsuitable for agricultural development because of unfavorable soil conditions and absence of a showing of an adequate supply of irrigation water will not be disturbed in the absence of substantial evidence showing that the classification is erroneous.

Milton L. Henderson, A-28065 (Dec. 22, 1959)

CULTIVATION

Suspension of cultivation and improvements until March 1, 1959, on a desert land entry subsisting on March 1, 1956, may be granted to a qualified entryman under the act of July 30, 1956.

Marian Ruth Smith, A-27537 (Jan. 24, 1958)

EXTENSION OF TIME

Extensions of time to submit final proof are properly refused to a desert land entryman where the land in his entry is situated within a critical water area in which the drilling of new irrigation wells is prohibited under State law and there is no indication that the restriction may be lifted in sufficient time to enable the entryman to comply with the desert land law within the period of the extensions requested.

Chester L. Clymer, A-26992 (Sept. 29, 1955)

DESERT LAND ENTRY--Continued

EXTENSION OF TIME--Continued

An application for an extension of time within which to make final proof on a desert land entry is properly denied where extensions have previously been allowed on the entry under every statutory provision authorizing such extensions.

Marian Ruth Smith, A-27537 (Jan. 24, 1958)

LANDS SUBJECT TO

Land which is within a stock-driveway withdrawal is not subject to desert land entry.

Land which has been reclaimed is not subject to desert land entry.

Len Everett, A-27050 (Mar. 23, 1955)

Lands withdrawn from all forms of appropriation under the public land laws and reserved for the use of the Department of the Air Force are not subject to desert land entry.

John C. Sanborn et al., A-27218 (Dec. 12, 1955)

Public lands which are included in a reclamation withdrawal and power site classification are not subject to entry under the Desert Land Act, and an application to enter such lands must be rejected.

Dores D. McGhee, A-27590 (May 22, 1958)

Lands included within a stock driveway withdrawal are not available for desert land entry.

Fern Hill Hunter, A-27756 (Jan. 13, 1959)

An application for desert land entry is properly rejected where the land applied for is withdrawn from entry as a part of a stock driveway.

Leonard R. Pollard, A-27982 (July 31, 1959)

DESERT LAND ENTRY --Continued

LANDS SUBJECT TO--Continued

The filing of an application for desert land entry gives the applicant no rights or interest in the land, and a desert land application was properly rejected where, after the application was filed, the land was withdrawn from appropriation under the public land laws and reserved for use by the Atomic Energy Commission.

Frances M. Williams, A-28034 (Aug. 20, 1959)

A desert land application is properly rejected when the land applied for is withdrawn from entry under the Reclamation Act.

Ernest R. Brassell et al., A-28096 (Oct. 29, 1959)

Public lands which are unsurveyed are not available for desert land entry and applications for such lands are properly rejected.

Wilson Thomas Corwin, Thomas Walter McBeath, A-28088 (Nov. 17, 1959)

Lands withdrawn under the Bankhead-Jones Farm Tenant Act from all forms of appropriation under the public land laws except the mining and mineral leasing laws are unavailable for desert land entry and an application for such entry is properly rejected.

Thomas Leroy Stokes, A-28109 (Nov. 27, 1959)

PROOF

Satisfactory final proof of the reclamation, irrigation, and cultivation of land in a desert land entry must show that the entryman has made a bona fide effort to produce an agricultural crop. The adequacy of such good faith is to be measured by the extent of the entryman's efforts to produce a productive and profitable crop, provided always that such efforts include performance of the acts of reclamation, irrigation, and cultivation within the defined scope of those terms.

The desert land law requires that in order to make satisfactory final proof of entry, an entryman must, in addition to the reclamation of the irrigable land in his entry, actually irrigate and cultivate one-eighth of this land.

DESERT LAND ENTRY--Continued

PROOF--Continued

The actual production of an agricultural crop is not required in order to make satisfactory final proof of the reclamation, irrigation, and cultivation of the one-eighth portion of the land in a desert land entry, but, except where grass crops only can be grown or where tillage would be detrimental to the soil, the cultivation of a desert land entry must at least include tillage.

Claude E. Crumb, A-26930 (Mar. 21, 1955)
62 I. D. 99

RECLAMATION

The desert land law requires that in order to make satisfactory final proof of entry, an entryman must, in addition to the reclamation of the irrigable land in his entry, actually irrigate and cultivate one-eighth of this land.

Claude E. Crumb, A-26930 (Mar. 21, 1955)
62 I. D. 99

WATER RIGHT

Whether water is subject to prior appropriation as required in the Desert Land Act is a matter governed by State law.

Applications for desert land entries in Arizona cannot be allowed, and allowed desert land entries in that State cannot be patented, where the entries are dependent upon percolating waters for reclamation.

When Congress provided in the Desert Land Act that the right to use of water by the entryman "shall depend upon bona fide prior appropriation," Congress used the words "prior appropriation" as words of art having reference to the well-established doctrine of prior appropriation then obtaining in the Western States and Territories.

Validity of Desert Land Applications and Entries in Arizona Dependent on Percolating Water For Reclamation, M-36263 (Feb. 23, 1955)
62 I. D. 49

DESERT LAND ENTRY--Continued

WATER RIGHT--Continued

A desert land application is properly rejected where the applicant fails to show that she has a water right to irrigate the lands applied for.

Bernice E. Kincaid, A-27043 (Mar. 18, 1955)

An application for desert land entry may not be allowed if based on waters which cannot be appropriated under the law of the State involved.

Desert Land Entry Water Rights in California, Colorado, Montana and Oregon, M-36378 (Jan. 19, 1956)

Applications to make desert land entries in Arizona cannot be allowed where the entries would be dependent upon percolating waters for reclamation.

Oma B. Davidson et al., A-27251 (Mar. 12, 1956)
63 I. D. 79

Where applicants for desert land entry have applied to the State Engineer for permits to appropriate underground water, even though permits are unnecessary, and permits will be issued or denied, depending on the availability of unappropriated water, action on the desert land applications will be suspended pending action by the State Engineer on the applications for permit.

Marvin P. Mitchell et al., A-27263 (Mar. 5, 1957)

Although the California law is not clear as to the rights of desert land entrymen to the use of percolating water underlying the entered land, there is sufficient support for the position that desert land entrymen do have appropriative rights and that such rights satisfy the requirements of the Desert Land Act so that the Department will not reject applications for desert land entry as a matter of law for the reason that the applicants intend to use percolating water for the reclamation of the entries.

Ruby E. Huffman, Frances Torres, and Beulah Mae Choquette, A-27373 (Mar. 21, 1957)
64 I. D. 57

DESERT LAND ENTRY--Continued

WATER RIGHT--Continued

An application for desert land entry which is not accompanied by any evidence that the applicant has a contractual right to the use of water to irrigate his entry or any assurance that he will be able to obtain such water is properly rejected.

Joseph W. Huntsman, A-27679 (Sept. 29, 1958)

A desert land application is properly rejected where the applicant proposes to irrigate his entry from underground water sources, but fails to show at the time of the filing of his application that he has acquired a right from the State to appropriate underground water or that he has taken appropriate steps, as far as then possible, looking to the acquisition of such a right.

Stanley C. Cheledinas, A-27985 (Aug. 3, 1959)

A desert land application is properly rejected where the applicant proposes to irrigate his entry from underground water sources, but fails to show at the time of the filing of his application that he has acquired a right from the State to appropriate underground water or that he has taken appropriate steps, as far as then possible, looking to the acquisition of such a right.

Delbert J. Rice, Robert E. Osborn, A-27971 (Aug. 3, 1959)

An application for desert land entry which is not accompanied by evidence of a water right, as required by the Department's regulations, must be rejected.

Rockwell A. Davis, Pedro O. Garcia, A-28071, A-28081 (Oct. 28, 1959)

EMINENT DOMAIN

The Government was not liable for its delay in making available to the contractor two tracts of the right-of-way which were to be acquired from the Northern Pacific Railroad when the Government was diligent both in initiating and prosecuting the negotiations for the acquisition

EMINENT DOMAIN--Continued

of these tracts. The obstacles which the Government encountered were wholly unexpected, and could not be overcome by any measures on its part short of the institution of condemnation proceedings, which were ordinarily undertaken only as a last resort, and the Government, moreover, was encouraged to be patient by a statement of the contractor's chief officer that he was not planning to operate on these tracts that year. Statements made by Government personnel at an award meeting concerning the probable date of the acquisition of these tracts were mere statements of expectations, and hence cannot be regarded as promissory in nature. While the contract provided that the Government would make every reasonable effort to secure the rights-of-way in advance of clearing operations, this was not tantamount to a promise that the rights-of-way would be available within a reasonable time.

Appeal of Paul C. Helmick Co., IBCA-39 (July 31, 1956) 63 I. D. 209

ENLARGED HOMESTEADS

GENERALLY

Where an enlarged homestead entry was properly canceled after due notice to the entryman, who does not apply for reinstatement until over 30 years later, and there is no evidence that the entryman has resided upon, cultivated, or improved the land or has in any manner been connected with or interested in it, the entry will not be reinstated, although the entryman is a disabled World War I veteran whose disability is assumed to be the reason he did not return to his entry after discharge.

George W. Dahl, A-27415 (Dec. 10, 1956)

Settlement on land before it was withdrawn from entry and settlement and reserved for classification under the Taylor Grazing Act did not entitle the settler to make an enlarged homestead entry on the land where the land was not designated by the Secretary of the Interior as subject to enlarged homestead entry.

Conrad J. Yede, A-28029 (Aug. 17, 1959)

ENLARGED HOMESTEADS--Continued

CLASSIFICATION

Land may be classified for entry under the Enlarged Homestead Act where it is shown that over one-half of the tract applied for is susceptible of cultivation and where the tract receives adequate rainfall to permit cultivation by dry farming methods, if the land is otherwise subject to entry under the act.

Alfred P. Conn, A-26825 (Supp.) (Feb. 1, 1955)

An enlarged homestead application for lands embraced in a reseeding project which are principally valuable as range land and for the production of forage grasses and which are located in an area where there is not sufficient rainfall for sustained production of crops by dry farming, is properly rejected.

Mrs. Emma G. Myers, A-27138 (June 29, 1955)

Enlarged homestead applications are properly rejected where climatic conditions such as insufficient rainfall and damaging frosts during the growing season make the land applied for unsuitable for the sustained production of cultivated crops by dry farming methods and where the land is chiefly valuable for the production of forage and native grasses.

Lew D. Cook, Oris Cook, A-27153 (Aug. 2, 1955)

An application for enlarged homestead entry is properly rejected where the land is too rough, the soil too shallow and rocky, and there is insufficient tillable land to meet the minimum cultivation requirements of the Enlarged Homestead Act.

Waylan Eugene Kuykendall, A-27143 (Aug. 18, 1955)

An application for enlarged homestead entry is properly rejected where the land has poor soil and insufficient rainfall for dry farming, and the soil is easily eroded because of excessive slope, so as to make the land extremely marginal for agricultural production.

David J. Taylor, A-27350 (Aug. 13, 1956)

An enlarged homestead application is properly rejected where the land applied for contains a droughty soil lacking in organic matter and incapable of storing sufficient moisture to produce harvestable agricultural crops,

ENLARGED HOMESTEADS--Continued

CLASSIFICATION--Continued

the land is located in an area of low annual rainfall so as to preclude sustained crop production by dry farming methods, and the applicant indicates that the land may be subject to irrigation.

Wesley Graden MacFarlane, A-27384 (Nov. 16, 1956)

An application for enlarged homestead entry is properly rejected where the land applied for contains fine sandy soils which are not suitable for cultivation and there is insufficient tillable soil to meet the minimum cultivation requirements of the Enlarged Homestead Act.

Ward Fredrick Larsen, A-27496 (Nov. 8, 1957)

Land which was covered by a stock-driveway withdrawal between 1920 and 1943, and thereafter included in the first general withdrawal of November 26, 1934, by Executive Order No. 6910 was not subject to a settlement claim in 1934 or thereafter, but the land may be included in an application for enlarged homestead entry, and, if suitable, opened for such entry under section 7 of the Taylor Grazing Act.

Conrad J. Yede, A-27534 (Jan. 24, 1958)

An application for enlarged homestead entry on lands embraced in grazing allotments which are principally valuable as range land and for the production of forage grasses and which are located in an area where there is not sufficient rainfall for sustained production of crops is properly rejected.

William Lind Hoyt, A-27686 (Oct. 27, 1958)

An application for enlarged homestead entry is properly rejected where the land applied for is marginal for agricultural purposes and does not contain sufficient tillable land to meet the requirements of an economic dry-farm unit.

Anderson O. Whitener, A-27626 (Dec. 3, 1958)

An application for enlarged homestead entry is properly rejected when dry farming operations are not shown to be feasible on land sought.

Paul E. Moyer, A-27613 (Dec. 24, 1958)

ENLARGED HOMESTEADS--Continued

CLASSIFICATION--Continued

An application for an enlarged homestead may be allowed even though the land is marginal for agriculture where the land is more valuable for the production of agricultural crops than for the production of native grasses and forage plants.

Robert B. Marshall, Trudie M. Ingram, A-27586, A-27593 (Jan. 13, 1959)

An application for enlarged homestead entry is properly allowed when dry farming operations are shown to be economically feasible on the land sought.

Paul E. Moyer, A-27613 (Supp.) (Feb. 12, 1959)

An application for enlarged homestead entry is properly rejected for land which is not suitable for production of crops for want of sufficient rainfall and susceptibility to extreme wind erosion.

Joe M. Di Matteo, A-28019 (Aug. 4, 1959)

An application for enlarged homestead entry is properly rejected where it is classified as unsuitable therefor because it contains insufficient tillable land to meet the minimum cultivation requirements of the Enlarged Homestead Act.

Conrad J. Yede, A-28029 (Aug. 17, 1959)

An enlarged homestead application is properly rejected where only a minor portion of the land applied for is marginally arable, and the tract has been classified as suitable for disposition by public sale as an isolated tract.

Michael J. O'Connor, A-28116 (Dec. 1, 1959)

LANDS SUBJECT TO

Land withdrawn, classified, or reported to be valuable for certain specified minerals, including oil and gas, is subject to entry under the Enlarged Homestead Act with a reservation to the United States of the deposits for which the land is withdrawn, classified, or reported to be valuable.

ENLARGED HOMESTEADS--Continued

LANDS SUBJECT TO--Continued

Land containing valuable mineral deposits, subject to disposition only under the mining laws, is not subject to entry under the Enlarged Homestead Act.

Alfred P. Conn, A-26825 (Supp.) (Feb. 1, 1955)

Where land was not designated as subject to stock-raising entry pursuant to an application therefor after the applicant settled on the land, the applicant may file a supplemental application for enlarged homestead entry on 320 acres of the land.

Conrad J. Yede, A-27534 (Jan. 24, 1958)

An application for enlarged homestead is properly rejected where at the time the application is filed the lands are not open to disposition under the public land laws.

Frank Harrington, A-27654 (Aug. 27, 1958)

Settlement on land before it was withdrawn from entry and settlement and reserved for classification under the Taylor Grazing Act did not entitle the settler to make an enlarged homestead entry on the land where the land was not designated by the Secretary of the Interior as subject to enlarged homestead entry.

Conrad J. Yede, A-28029 (Aug. 17, 1959)

MINERAL RESERVATION

Where a patent issued containing a reservation to the United States under the act of July 17, 1914, of all oil and gas in an enlarged homestead entry in accordance with the notation of the reservation in the final certificate, and where that notation is identical with the amendment of the final certificate to which the entryman was required to, and did, consent before the final certificate was approved, the fact that only a part of the land in the entry was included within a petroleum withdrawal when the entryman filed his consent to the reservation does not warrant a conclusion that the reservation as to the land not within the withdrawal was erroneous.

Edward Christman et al., A-27052 (April 1, 1955) 62 I. D. 127

ENLARGED HOMESTEADS--Continued

MINERAL RESERVATION--Continued

Where a patent was issued in 1919 containing a mineral reservation to the United States of all minerals under the Stockraising Homestead Act of December 29, 1916, and the patentee accepted the patent without objection, a supplemental patent without a mineral reservation as to part of the land as to which the reservation may have been erroneously imposed will not be issued where the patentee did not object and the successor to the patentee has held title for 24 years without protest and the Department has issued an oil and gas lease for the land involved.

Conrad Luft, A-27246 (Feb. 13, 1956)
63 I. D. 46

PROOF

Final proof of an enlarged homestead entry is properly rejected and the entry canceled where the proof shows on its face that the entryman has not resided upon the land during the period of his entry.

Marvin E. Powell, A-27510 (Nov. 19, 1957)

EXCHANGES OF LAND
(See also Indian Lands, Private Exchanges, State Exchanges)

FOREST EXCHANGES

Where a protest is made against the consummation of a forest exchange on the ground that the protestant is the owner of the timber on the land offered in exchange by the State, and the record is inconclusive as to the validity or invalidity of the appellant's claim of ownership, the exchange will not be consummated until such time as an authoritative determination of the validity of the claim is made in an appropriate proceeding.

Thomas M. Reid, A-27217 (Nov. 17, 1955)

EXCHANGES OF LAND --Continued

FOREST EXCHANGES--Continued

The authority in the act of February 28, 1925 (43 Stat. 1090; 16 U.S.C. sec. 486), for either party to an exchange authorized by the act of March 20, 1922 (42 Stat. 465; 16 U.S.C. sec. 485), to reserve minerals in lands conveyed thereunder is without limitation or qualification and such reservations may therefore embrace all or part of the mineral estate.

Conveyance of the Surface and a Fractional Mineral Interest Therein to the United States in Forest Exchanges, M-36415 (Jan. 30, 1957)

EXECUTIVE ORDERS AND PROCLAMATIONS

Other than in contracts for the construction of projects undertaken pursuant to the Navajo-Hopi Rehabilitation Act of April 19, 1950 (64 Stat. 44, 45; 25 U.S.C. 633), the provisions in construction contracts executed by officers of the Bureau of Indian Affairs which require contractors to afford Indians a preference right to employment is in conflict with the nondiscrimination requirement of E.O. 10557 (19 F.R. 5655; September 3, 1954) and should be discontinued.

Non-Discrimination by Government Contractors, M-36285 (June 15, 1955)

Neither Executive Order No. 10585, dated January 1, 1955 (20 F. R. 17), nor Proclamation No. 3080 of the same date (20 F. R. 173), terminated the Korean conflict.

Termination of Korean Conflict, M-36376 (Aug. 1, 1955)

Executive Order 10582 of December 17, 1954 (3 CFR, 1954 Supp., 96), applies to construction contracts as a matter of departmental policy and legal determination. Cf. 36 Comp. Gen. 718 (1957). The applicability of the Buy American Act (41 U. S. C. sec. 10b), to construction contracts extends only to construction materials and their components used in the construction.

Applicability of Executive Order 10582 to Construction Contracts, M-36488 (Mar. 17, 1958)

EXPENDITURES
(See also Funds)

SPECIAL FUNDS

Expenses incurred by the Tribal Council on and after the date of the Secretarial proclamation declaring the act of September 3, 1954, to be in effect are not reimbursable by the United States.

The payment of $2,250,000 provided for in section II of the act may not be increased or decreased without further legislation by the Congress.

Interpretation of the Cheyenne River Act of September 3, 1954 (68 Stat. 1191), M-36323 (Jan. 12, 1956) 63 I. D. 7

FEDERAL COAL MINE SAFETY ACT

The inspection provisions of Title II of the Federal Coal Mine Safety Act apply to Indian-operated mines on Indian lands.

Application of the Mine Inspection Provisions of Title II of the Federal Coal Mine Safety Act to Mines on Indian Lands, M-36312 (Oct. 21, 1955)

FEDERAL EMPLOYEES AND OFFICERS

AUTHORITY TO BIND GOVERNMENT

Where a preference right claimant to land offered at public sale fails to submit the proof of ownership of adjoining land required by the Department's regulations, he loses his preference right notwithstanding the fact that he was assured by the manager that the proof of title which he did submit was satisfactory.

William H. Boyd, Clarence Virgil West, A-27440 (June 3, 1957)

FEDERAL EMPLOYEES AND OFFICERS--Continued

AUTHORITY TO BIND GOVERNMENT--Continued

The Department is required to refuse to record scrip offered for recording more than two weeks after the end of the period specified by the statute which requires recording; erroneous information as to the termination of the statutory period for recording will not permit the Department to ignore the plain provision of the statute.

Warren A. Taylor, A-27702 (Nov. 5, 1958)

The United States cannot be bound by the unauthorized acts of its agents.

Calazona Fertilizer Company, A-27710 (Jan. 19, 1959) 66 I. D. 4

Where a preference-right claimant to land offered at public sale submits a document which is not proper proof of ownership of contiguous land as clearly required by the Department's regulation, his failure cannot be excused on the ground that the manager had uniformly accepted such documents as proof of ownership in the past.

Elizabeth A. Tallon, Oscar Jones, A-27910 (May 18, 1959)

The Department is not bound or estopped by erroneous advice given by personnel of the Bureau of Land Management.

Mike Abraham, A-28163 (Nov. 16, 1959)

AWARDS

Necessary expenses, including the cost of travel to departmental convocations, may be incurred in connection with honorary awards to retired employees of the Department under the Government Employees' Incentive Awards Act (act of September 1, 1954, Title III; 68 Stat. 1112).

Payment of Travel Expenses of Retired Employees to Receive Awards, M-36290 (June 30, 1955)

FEDERAL EMPLOYEES AND OFFICERS--Continued

COMPENSATION

The 3-year period required for a longevity increase is interrupted if a position held by an employee is reclassified in a higher grade and despite the subsequent restoration of the position to the initial grade. The 3-year period must be computed from the date upon which the position was restored to the initial grade.

Longevity Step-Increases, M-36272 (April 5, 1955)

INTEREST IN LANDS

The fact that a United States deputy mineral surveyor performed the work of locating a claim for a patent applicant does not, in the absence of evidence that at the time of location the surveyor had, or has since acquired, an interest in the land, make the location void by reason of section 452 of the Revised Statutes which prohibits the purchase or acquisition of interests in the purchase of public lands by officers, clerks, and employees of the General Land Office.

Seymour Gray et al. v. Milner Corporation, A-27431 (Aug. 21, 1957) 64 I. D. 337

MEMBERS OF CONGRESS

The provisions of 18 U.S.C. sec. 431, and of section 9 of noncompetitive oil and gas leases make unlawful the holding of an oil and gas lease by a Member of Congress even though the lease was issued at a time when the lessee was not a Member of Congress.

John E. Miles, A-27075, A-27144 (April 11, 1955) 62 I. D. 135

The first United States Senators elected to represent the State of Alaska following its admission into the Union should be chosen without distinction in regard to length of time they are to serve in their initial term of office.

Classification of the First Senators From the State of Alaska in Regard to their Initial Term of Office, M-36522 (July 30, 1958)

FEDERAL EMPLOYEES AND OFFICERS--Continued

POLITICAL ACTIVITIES

Section 2 of the Hatch Act prohibiting participation in or interference with the election of certain officers is applicable to the Governor and secretary of the Territory of Hawaii as well as other individuals similarly situated.

Section 9 of the Hatch Act is not applicable to the Governor of the Territory of Hawaii.

Applicability of the Hatch Act to the Governor of the Territory of Hawaii, M-36576 (June 12, 1959) 66 I. D. 281

FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT

(See also Surplus Property)

The Department of the Interior has been designated as disposal agency for Government-owned power and communication facilities under the jurisdiction of the Interior Department which have a total estimated fair market value of $1,000 or more. The Secretary of the Interior has the responsibility of disposing of such telephone lines on Indian reservations by advertising and competitive bid or by negotiation, in his discretion, after he has determined them excess to the needs of the Department and, as the designee of the Administrator of the General Services Administration, has determined them surplus to the needs of the Government.

Sale of Government-Owned Telephone Line and Associated Equipment on the Blackfeet Reservation, M-36359 (Nov. 29, 1956)

Fishing vessels acquired by the United States as an incident of the loan program may be disposed of under the Federal Property and Administrative Services Act of 1949 (63 Stat. 378; 40 U. S. C. sec. 471) as amended.

Where the [fishing] vessel was purchased solely to protect the interest of the United States by virtue of its lien and is not required for the needs of this Department or the discharge of its responsibilities, its disposal under the provisions of the act is authorized.

Sale of Vessel Acquired as Incident to Foreclosure of Fisheries Loan, M-36565 (Jul. 27, 1959)

FEES

(See also, Accounts)

A filing fee of $10 is payable by an adverse claimant at the time of filing an adverse claim against an application for mineral patent (43 CFR 185.84), but failure to pay the required fee at the time of submitting the claim does not nullify an otherwise sufficient claim, and the fact that the required fee was not paid until after the expiration of the period allowed for filing the claim does not defeat the claim, the fee having been promptly paid when requested of the adverse claimants.

California Perlite Corporation et al., A-27444 (July 22, 1957)

One who applies for a right-of-way under the act of January 21, 1895, must comply with the requirements of the regulations and pay whatever fee that they require. And, whether he acquire a right-of-way under an appropriate rights-of-way act or use the land for that or any other purpose, he must comply with all applicable regulations issued under the Oregon and California Grant land laws, which are directed to the management of the area, but such regulations may not impose fees for the enjoyment of rights granted by other laws unless clearly authorized by law.

Rights of Mining Claimants to Access Over Public Lands to Their Claims, M-36584 (Oct. 20, 1959) 66 I. D. 361

FISH AND WILDLIFE SERVICE

Public Law 1024, 84th Cong. (70 Stat. 1119), established the broad authority of the Secretary of the Interior to make loans with respect to financing and refinancing of operations, maintenance, replacement, repair, and equipment of fishing gear and vessels, and for research into the basic problems of fisheries. Administration of the loan fund requires consideration of the requirements of Maritime law as well as the matter of security for loans to be granted.

Interpretation and Effect of Public Law 1024, 84th Cong., on Administration of Fisheries Loan Fund Through United States Fish and Wildlife Service, M-36397 (Dec. 7 1956)

FISH AND WILDLIFE SERVICE--Continued

Lands withdrawn from mining location cannot be made subject to location by modifying the withdrawal where, after the lands were withdrawn the Fish and Wildlife Service had, pursuant to statutory authority, granted the use and control of the land to a State for use in a wildlife project unless or until the land is released by the State.

Application of Mining Laws to Withdrawn Lands Used by a State for Wildlife Purposes, M-36407 (Jan. 25, 1957)

There is no general statutory authority for the construction of fish hatcheries and the acquisition of lands therefor sufficient to overcome a point of order directed to an item in a general appropriation bill making funds available for the establishment and construction of a fish hatchery. The act of August 14, 1946 (60 Stat. 1080; 16 U. S. C. secs. 661-666c), commonly known as the Coordination Act, authorizes the appropriation of funds for the construction of fish hatcheries and other facilities where such facilities are necessary for the economical administration of areas made available to the Secretary of the Interior under the act.

Statutory Authority for Construction of Fish Hatcheries, M-36498 (Feb. 11, 1958)

In apportioning Federal funds for wildlife restoration purposes under section 4 of the Pittman-Robertson Act (50 Stat. 918; 16 U.S.C. 669c), as amended, the Secretary of the Interior should include as "license holders of each State" all individuals to whom a State has issued one or more licenses; he should not include all licenses issued by a State when, under State law, more than one license may be issued to a single individual.

In apportioning Federal funds for wildlife purposes under section 4 of the Pittman-Robertson Act the Secretary of the Interior, acting through such rules and regulations as he deems appropriate, is entitled to require from each State to which he apportions funds, a duly executed certificate of the number of license holders in the State before he determines the amount of the annual sums payable to that State under the Act.

Interpretation of Section 4 of the Pittman-Robertson Act (50 Stat. 918; 16 U.S.C., sec. 669c), as Amended, M-36560 (Jun. 4, 1959) 66 I. D. 219

Fishing vessels acquired by the United States as an incident of the loan program may be disposed of under the Federal Property and Administrative Services Act of 1949 (63 Stat. 378; 40 U. S. C. sec. 471) as amended.

FISH AND WILDLIFE SERVICE--Continued

Where a fishing vessel is sold to satisfy a first lien held by the United States arising out of a fisheries loan authorized by the Fish and Wildlife Act of 1956 (70 Stat. 1119; 15 U.S.C. sec. 742a), the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale as the Secretary of the Interior or his authorized representative may direct. 62 Stat. 972; 28 U.S.C. sec. 2410.

Sale of Vessel Acquired as Incident to Foreclosure of Fisheries Loan, M-36565 (July 27, 1959)

FREIGHT RATES

The Secretary of the Interior has authority under the provisions of the act of March 12, 1914 (38 Stat. 305; 48 U.S.C. sec. 301 et seq.), to establish through rates which are different from local rates applicable to intermediate points and to establish rates for freight shipped from ports in the States via steamship and the Alaska Railroad.

Alaska Railroad Freight Rates, M-36317 (Jan. 19, 1956) 63 I.D. 33

FUNDS

(See also Accounts, Appropriations, Expenditures)

GENERALLY

Expenses incurred by the Tribal Council on and after the date of the Secretarial proclamation declaring the act of September 3, 1954, to be in effect are not reimbursable by the United States.

The payment of $2,250,000 provided for in section II of the act may not be increased or decreased without further legislation by the Congress.

Interpretation of the Cheyenne River Act of September 3, 1954 (68 Stat. 1191), M-36323 (Jan. 12, 1956) 63 I.D. 7

FUNDS--Continued

GENERALLY--Continued

In apportioning Federal funds for wildlife restoration purposes under section 4 of the Pittman-Robertson Act (50 Stat. 918, 16 U.S.C. 669c), as amended, the Secretary of the Interior should include as "license holders of each State" all individuals to whom a State has issued one or more licenses; he should not include all licenses issued by a State when, under State law, more than one license may be issued to a single individual.

In apportioning Federal funds for wildlife purposes under section 4 of the Pittman-Robertson Act the Secretary of the Interior, acting through such rules and regulations as he deems appropriate, is entitled to require from each State to which he apportions funds, a duly executed certificate of the number of license holders in the State before he determines the amount of the annual sums payable to that State under the Act.

Interpretation of Section 4 of the Pittman-Robertson Act (50 Stat. 918; 16 U.S.C., sec. 669c), as Amended, M-36560 (Jun. 4, 1959) 66 I.D. 219

CONTRIBUTED FUNDS

The language of the current legislation (act of August 31, 1954; 68 Stat. 1037) authorizing acceptance of donated funds to be matched by appropriated funds for acquisition of non-Federal lands within the existing boundaries of any national park is clear and unambiguous and it was the intent of the Congress to require that donations be made in cash in order to be eligible for such matching. Accordingly, a donation of an equivalent in land value could not be accepted in lieu of a cash donation.

Use of "50-50" Land Acquisition Funds for the Possible Acquisition of Tract No. 317-B (Marie Schuler), Rocky Mountain National Park, M-36384 (Oct. 19, 1956)

An agreement by a landowner to donate funds to the National Park Trust Fund, conditioned upon the purchase of the land for national park purposes and the use of the funds to construct a road from which the landowner will benefit as life tenant of the land, is invalid and unenforceable since a donation upon these conditions will not result in a "voluntary transfer of property without any consideration or compensation therefor."

A contract to purchase non-Federal land in a national park subject to a reservation by the vendor of a life estate, if coupled with a prior agreement by the landowner to "donate" funds

FUNDS--Continued

CONTRIBUTED FUNDS--Continued

to the National Park Trust Fund if and when the purchase is completed, on condition that the funds are to be used to construct a road from which the life tenant will benefit, is unauthorized

Authority to Enter Into a Contract to Purchase Land if Coupled with an Agreement by the Landowner to Donate Funds to the United States for Specified Purposes When the Purchase is Completed; Eileen M. Hunter Property, Grand Teton National Park, M-36402 (Jan. 14, 1957)

GEOLOGICAL SURVEY

When the Director of the Geological Survey recommends certain acquired lands of the United States for leasing in accordance with the competitive leasing provisions of the Mineral Leasing Act, he has, in effect, defined them as being within the known geologic structure of a producing oil and gas field.

Max Barash, The Texas Company, A-27239 (Feb. 14, 1956) 63 I. D. 51

The supervision of oil and gas development and producing operations on Federal, public and acquired land oil and gas leases is a function of the Geological Survey and reports of violations of the relevant lease terms and operating regulations should be referred to the appropriate official of that Bureau.

Rights of an Oil and Gas Lessee to the Use of the Surface of the Land and Surface Materials in His Lease, and With Respect to Injury to the Land and Vegetation by Reason of Operations Under the Lease, M-36575 (Aug. 26, 1959)

GRAZING LEASES

GENERALLY

Accrued rental under a grazing lease becomes a debt due to the United States which the Secretary of the Interior has no authority to waive or compromise.

E. R. Wheeler, A-27069 (April 1, 1955)

GRAZING LEASES--Continued

GENERALLY--Continued

An application for a grazing lease will not be allowed for land already under grazing lease to another, where there is no basis for canceling the outstanding lease.

Robert E. Rowe, A-27063 (April 11, 1955)

An applicant for a grazing lease who is not qualified as a preference right applicant has no standing to complain of the issuance of a consolidated grazing lease to a preference right claimant without the giving of notice to the former.

Carl O. Thomsen, Carl M. Ballinger, A-27171 (Nov. 7, 1955)

The Department will adhere to its position that a mineral locator of an unpatented mining claim has no right to its surface resources, except such as may be required for actual mining purposes, and that the Department has authority to issue grazing leases under the Taylor Grazing Act to utilize the grazing resources on such claims.

Albert Braach, A-27225 (Dec. 28, 1955)

APPLICATIONS

After partial rejection of an application for renewal of a grazing lease because of a competing application filed by a contiguous landowner, notice during the pendency of an appeal from such rejection that the competing applicant has disposed of his base lands requires that the appeal be remanded to the Bureau of Land Management for disposition in accordance with the altered circumstances.

Evan J. Watt, Trustee, et al., Coyne C. Tibbets, A-27775 (Dec. 23, 1958)

APPORTIONMENT OF LAND

Where conflicting preference right applications are filed for grazing leases, a division for leasing purposes of the available public land by the district range manager will not be disturbed where it appears from a review of the factors involved that the division is equitable.

Maynard and Mattie Newcombe, K. R. Rhiley, A-27199 (Nov. 9, 1955)

GRAZING LEASES--Continued

APPORTIONMENT OF LAND--Continued

A division of lands for grazing purposes among preference right applicants on an equal plane of preference will not be disturbed on appeal where review of all the factors involved indicates that the division was equitable.

Albert H. Oldman, Jr., Fred Rutschman, A-27337 (July 6, 1956)

Where land available for leasing under section 15 of the Taylor Grazing Act is not sufficient to enable each preference right applicant to receive sufficient land to permit the proper use of his contiguous land, an apportionment of the available land among the preference right applicants must be made.

Hamilton H. Fox, A-27258 (Aug. 14, 1956) 63 I. D. 258

A division of lands for grazing purposes among preference right applicants on an equal plane of preference will not be disturbed on appeal where review of all of the factors involved indicates that the division is equitable.

Paul A. Kropp, Larson Brothers, A-27490 (Oct. 25, 1957)

As between contending applicants for section 15 leases who own contiguous lands, an award must be made to the one who has greater need of the public land to permit proper use of his contiguous land. If only one of the applicants owns adjoining land, an award must be made to him if he needs the public land for proper use of his contiguous land even though another applicant may have a greater need for the public land. If none of the contending applicants owns contiguous land, an award is to be made between them on the basis of such factors as their need for the land and proper range management practices.

Where two contending preference-right applicants have not shown that they need the public land applied for in order to enable them to make proper use of their contiguous lands, an award is to be made between them as though they were not preference-right applicants.

Winchester Land and Cattle Company et al., A-27546 (Apr. 8, 1958) 65 I. D. 148

GRAZING LEASES--Continued

ASSIGNMENT

A grazing lease may be assigned only with the consent of the signing officer which is evidenced by the issuance of a new lease to the assignee.

Carl O. Thomsen, Carl M. Ballinger, A-27171 (Nov. 7, 1955)

CANCELLATION

A determination by the manager of the amount of compensation to be paid to a grazing lessee for his improvements upon the cancellation of his lease will not be disturbed where it is accurate and reasonable; however, an award of compensation for the loss of grazing use should be reexamined where in fact the lease has been allowed to run for its full term and the lessee has not apparently suffered any loss of grazing use.

The existence of a grazing lease will not bar the disposal, in accordance with the general authority of section 7 of the Taylor Grazing Act, of the leased land through public sale as an isolated tract; and the grazing lease may be canceled in order to effect such disposal.

Henry Petz, Mary B. Wilson, Administratrix of the Estate of Frank H. Wilson, A-27017 (Feb. 11, 1955) 62 I. D. 33

A grazing lease is subject to termination in whole or in part because of loss of control by the lessee of all or a part of any lands which were recognized as the basis of his preference right to the lease.

Carl O. Thomsen, Carl M. Ballinger, A-27171 (Nov. 7, 1955)

Where the range manager has held a grazing lease for cancellation on the basis of unverified complaints and without allowing the lessee 30 days to cure a default, as provided in the lease, it is proper to remand the matter for further investigation and procedure in accordance with the terms of the lease.

Albert Braach, A-27225 (Dec. 28, 1955)

GRAZING LEASES--Continued

CANCELLATION--Continued

A grazing lease issued under section 15 of the Taylor Grazing Act provides for the reduction of the leased area where it is unreasonably excessive for the number of stock owned by the lessee, and where leased land is not used to graze livestock and the amount leased seems excessive for the number of stock presumably owned by the lessees, the case will be remanded to determine to what extent the leased area may be excessive and to reduce it accordingly.

The fact that lessees apparently have no water available for stock on lands included in section 15 grazing leases and that the lessees have no preference right to a lease are not grounds for canceling the leases.

Nyswonger Brothers, Ebbie Davis and Sam Fancher, A-27238 (Feb. 29, 1956)

It is proper to cancel a portion of a grazing lease where it appears that the land is suitable for desert land entry, and it does not appear that cancellation of the lease will seriously interfere with the lessee's grazing operations.

Sidney Smith, A-27249 (Mar. 12, 1956)

Before a grazing lease, issued pursuant to section 15 of the Taylor Grazing Act, can be canceled to permit entry of the land under the Desert Land Law, it must be shown that the land has been properly classified for disposition under that law.

Walter E. Scott, A-27293 (June 21, 1956)

A portion of a grazing lease may properly be canceled where it appears that the land is suitable for disposition by public sale, and partial cancellation of the lease will not seriously interfere with the lessee's grazing operations.

Gladys M. Waters, A-27394 (Dec. 20, 1956)

Where land is included in a grazing lease because the lessee controls base land which was recognized as giving him a preference right to the leased land, the lease can be canceled as to the leased land when the lessee loses control over the base land.

GRAZING LEASES--Continued

CANCELLATION--Continued

A grazing lease is improperly issued and is subject to cancellation where it is issued to one applicant during the time that a conflicting applicant has a right to appeal from the award to the former.

A valid existing grazing lease can only be canceled under some provision of the regulations of the Department or the lease itself and it is error to partially cancel a lease on the ground that some other party can better utilize the land for grazing in conjunction with private lands he owns or controls.

Joseph Rebich et al., A-27491 (Jan. 13, 1958)

Where a desert land entry is allowed for part of the land included in a grazing lease and the lease is cancelled to that extent, a protest against the allowance of the desert land entry is properly dismissed where there is no showing that partial cancellation of the lease will seriously interfere with the lessee's grazing operations.

Ethel M. Lidstone, A-27757 (Dec. 3, 1958)

An isolated tract of public land is properly classified as suitable for disposal by public sale when sale of the land will not seriously interfere with grazing operations being conducted on the land under a grazing lease.

James P. Winslow, A-28115 (Dec. 22, 1959)

PREFERENCE RIGHT APPLICANTS

The division of public lands among grazing lease applicants on an equal plane of preference must be guided by the requirements of equity and the public interest. Consideration must also be given to the comparative ability of the applicants effectively to utilize the range under proper range management practices, the amount of Federal range that is necessary to permit proper use of the preference right applicant's base land, and any other factors which are pertinent to the purposes of the Taylor Grazing Act.

A division of lands for leasing purposes among preference right applicants on an equal plane of preference will not be disturbed on appeal where a review of all the factors involved

GRAZING LEASES--Continued

PREFERENCE RIGHT APPLICANTS--Continued

indicates that the division was equitable, and the mere fact that a former grazing lessee, who is also a present conflicting preference right applicant, will probably be economically disadvantaged by such a division, does not per se amount to a failure to do equity.

James M. Stoos, A-27042 (Mar. 23, 1955)

An award of a grazing lease to a qualified preference right applicant will not be disturbed merely because another competing preference right applicant fears it may cause range trouble.

Roy H. Unzicker, Ethel L. Zehner, A-27070 (Mar. 23, 1955)

Section 15 of the Taylor Grazing Act, as amended, providing that preference shall be given to certain occupants of contiguous lands to the extent necessary to permit the proper use of such contiguous lands does not require the Department to seek out persons in the preferred class and offer them grazing leases. It requires only that if such persons file timely applications for grazing leases their applications shall be preferred over the applications of those not in the preferred class.

Robert E. Rowe, A-27063 (April 11, 1955)

Where a preference right grazing lease application was rejected because the land applied for was included in an existing preference right lease issued to another and where substantial evidence in the record suggests that the lessee thereunder no longer occupies or controls the base lands and that livestock belonging to persons other than the lessee are using the base and leased lands, and the record contains a request for assignment of lease forms for a transferee of the lessee, the case will be remanded for determination as to who controls the base land, whether the leased land is being used by livestock not belonging to the lessee, whether any successor or assignee of the lessee is entitled to a new lease, and for consideration of the needs of conflicting preference right applicants for the available range if a new lease is to be issued.

Carl O. Thomsen, Carl M. Ballinger, A-27171 (Nov. 7, 1955)

GRAZING LEASES--Continued

PREFERENCE RIGHT APPLICANTS--Continued

Quaere: Whether privately owned land separated from public land by a meandered nonnavigable stream is contiguous to the public land so as to entitle the holder of the private lands to a preference right to a grazing lease on the public land.

Maynard and Mattie Newcombe, K. R. Rhiley, A-27199 (Nov. 9, 1955)

A corporation whose claim to a preference right to a lease under section 15 of the Taylor Grazing Act is predicated upon the fact that members of the corporation own or lease lands contiguous to the land applied for is not a preference right claimant unless it can show that it at least occupies such contiguous lands.

Hamilton H. Fox, A-27258 (Aug. 14, 1956) 63 I. D. 258

In order to be entitled to a preference right to a grazing lease under section 15 of the Taylor Grazing Act, one need not be engaged in the livestock business or derive his principal source of income from raising livestock. However, whether one is primarily or exclusively engaged in the livestock business is a factor which can be considered in making an award of leases between two preference-right applicants.

A preference-right applicant for a lease under section 15 of the Taylor Grazing Act must show that he needs the public land applied for to enable him to make proper use of his contiguous land; thus where an applicant owns land contiguous to public land applied for and uses both for summer grazing, he cannot claim a preference right on the ground that he needs the public land to complement his operations on winter lands which are also owned by him but which are not contiguous to the public land.

Where two contending preference-right applicants have not shown that they need the public land applied for in order to enable them to make proper use of their contiguous lands, an award is to be made between them as though they were not preference-right applicants.

As between contending applicants for section 15 leases who own contiguous lands, an award must be made to the one who has greater need of the public land to permit proper use of his contiguous land. If only one of the applicants owns adjoining land, an award must be made to him if he needs the public land for proper use of his contiguous land even though another applicant may have a greater need for the public land.

GRAZING LEASES--Continued

PREFERENCE RIGHT APPLICANTS--Continued

If none of the contending applicants owns contiguous land, an award is to be made between them on the basis of such factors as their need for the land and proper range management practices.

Where the case files contain insufficient factual information upon which to make an award of public land between two contending preference-right applicants, the case will be remanded to the Bureau of Land Management for a further investigation.

Winchester Land and Cattle Company et al., A-27546 (Apr. 8, 1958) 65 I. D. 148

RENEWAL

It is questionable whether the holder of a grazing lease containing a contractual right of renewal is entitled to a renewal of his lease as to all the land included in his previous lease where he no longer needs all the land for grazing purposes.

G. Phil Kent et al., A-27039 (Mar. 23, 1955)

Where a grazing lease, whose 10-year term commenced July 2, 1942, provided that, if at the end of the term it should be determined that a new lease should be granted, the lessee would then be accorded a preference right thereto on such terms and for such duration as might be fixed by the lessor, the term of the renewed lease was not required to be of the same duration as that of the original lease; and the lessee had no right to a new lease of longer duration than that actually fixed by the lessor.

James M. Stoos, A-27042 (Mar. 23, 1955)

After partial rejection of an application for renewal of a grazing lease because of a competing application filed by a contiguous landowner, notice during the pendency of an appeal from such rejection that the competing applicant has disposed of his base lands requires that the appeal be remanded to the Bureau of Land Management for disposition in accordance with the altered circumstances.

Evan J. Watt, Trustee, et al., Coyne C. Tibbets, A-27775 (Dec. 23, 1958)

GRAZING PERMITS AND LICENSES

GENERALLY

Where a copy of a grazing permit cannot be found in the Department's records or produced by the permittee, the existence and terms of the permit may be established by other departmental records alluding to it and by the testimony of the permittee.

In the absence of persuasive evidence that the conclusions are incorrect, the estimates of grazing capacity made in accordance with standard Bureau practices are to be used in determining the grazing capacity of public lands.

C. A. George, Verva Bowen, A-27488 (Nov. 7, 1957)

Determinations of the carrying capacity of the Federal range within a grazing district, of the commensurability of base property, and of proper seasons of use of the range are within the discretion of the range manager, and his determinations will be accepted where there is no showing of error, discrimination, or arbitrariness.

Where the renewal of a grazing permit was not denied to an applicant for grazing privileges and there is no evidence that the value of the applicant's grazing unit will be impaired by action taken on his applications, the provision in section 3 of the Taylor Grazing Act that no permittee who has complied with the applicable rules and regulations shall be denied the renewal of a grazing permit if such denial will impair the value of his grazing unit has no effect on the award of grazing privileges to which the applicant is entitled.

Charles H. McChesney et al., A-27630 (May 28, 1958) 65 I. D. 231

"Saddle horses" do not qualify an applicant for a free-use license; however, horses used as "work stock" may.

A free-use applicant is not disqualified to receive the free-use license applied for by the mere fact that he can care for his livestock kept for domestic purposes on his private land, nor by the mere fact that he is a regular grazing licensee or permittee, nor by the mere fact that he is not dependent on the soil and its products along with a few domestic livestock and their products for his principal means of livelihood.

GRAZING PERMITS AND LICENSES--Continued

GENERALLY--Continued

The "right" to a free-use license is circumscribed and necessarily limited by its possible effect, in the discretion of the Secretary of the Interior (and his delegates) on other users in an allotted Federal range area.

Opinions Relating to Fence Construction and Free-Use Licenses on the Federal Range, M-36521 (June 27, 1958) (Memorandum from Field Solicitor, Salt Lake City, Utah, to State Supervisor for Utah, Bureau of Land Management.)

The provision in the Federal Range Code that in the event of failure for 2 consecutive years to offer base in an application for a grazing license or permit, such property will lose its dependency by use or priority will be read independently of and as unaffected by the provision in the code that each year a time will be set before which applications for grazing privileges must be filed and that applications which are not filed on or before that date will be rejected for that year in the absence of a satisfactory showing justifying the late filing.

Don C. Call, Lloyd Higley et al., A-27658 (Sept. 29, 1958) 65 I. D. 409

Class 2 licenses and permits, properly issued in accordance with the Federal Range Code, are "regular" licenses and permits as that term is used in the Federal Range Code.

Interpretation of 43 CFR 161.6(f) Reduction of Grazing Privileges to Reach Carrying Capacity of an Area or Unit, M-36550 (Jan. 7, 1959)

/Memorandum from Regional Solicitor, Portland, Oregon, to Oregon State Supervisor, Bureau of Land Management./

The grazing of an excess number of cattle within an area covered by an individual grazing allotment constitutes a trespass on public land even though a portion of the area is privately-owned land enclosed by a fence and damages for such trespass are properly computed on the basis of the number of cattle in excess of the allotment, the length of such unauthorized grazing, and a reasonable charge for the forage thus consumed.

J. Leonard Neal, A-27922 (Jun. 4, 1959) 66 I. D. 215

GRAZING PERMITS AND LICENSES--Continued

GENERALLY--Continued

A livestock operator may not be awarded grazing privileges in excess of those authorized by the Federal Range Code and the fact that he was previously awarded privileges greatly exceeding the number which his property is qualified to support does not justify the continuance of awards which are not in conformity with the requirements of the code.

Sidney W. Nicholes, A-27918 (Aug. 7, 1959)

ADJUDICATION

Where, after hearing on the denial of a grazing permittee's application for use of a specific portion of the Federal range, the examiner found that the permittee's livestock used the area in question during the priority period, an apparent conclusion in the decision on appeal from the examiner's decision will be set aside where it is inconsistent with the examiner's finding regarding use of the area in dispute during the priority period, where substantial evidence upon which such conclusion is based is not set forth, and where such conclusion might later prejudice the interests of the permittee.

M. F. Sullivan et al., A-27329 (Aug. 20, 1956) 63 I. D. 269

A grazing licensee is not entitled to a license permitting him to graze 100 percent on the Federal range where the Federal range is interspersed with the licensee's privately owned unfenced lands and his livestock grazes the entire year partly on the Federal range and partly on his own lands.

A protest against issuance of a grazing license permitting only a percentage Federal range use is properly denied where it is shown that the licensee is receiving all of the grazing privileges to which he is entitled, and no showing is made that his grazing privileges are adversely affected by virtue of such license.

Leo Sheep Company, A-27424 (May 7, 1957)

Although a range manager's decision on an application for grazing privileges may satisfy the requirements for a notice of hearing under the Administrative Procedure Act, such a decision does not constitute a notice of hearing under the Administrative Procedure Act and a

ADJUDICATION--Continued

hearing which is held on the applicant's appeal from the range manager's decision is not in violation of the Administrative Procedure Act because the decision does not conform to the requirements for a notice of hearing imposed by the Administrative Procedure Act.

E. L. Cord, DBA El Jiggs Ranch, A-27426 (June 25, 1957) 64 I. D. 232

Where subsequent to a decision of a hearing examiner a providion of the Federal Range Code relating to the method of computing the dependency by use or priority to be attached to base property is amended to provide a more liberal formula than that permitted under the terms of the previous code, the amended provision should be applied in adjudicating the future grazing privileges of an applicant for grazing rights.

Mahaffey Livestock, Inc., A-27441 (July 22, 1957) 64 I. D. 290

The fact that a grazing licensee may have been found by a State court to be entitled to use certain waters for stockwatering purposes does not enlarge in any way the licensee's demand on the Federal range.

A grazing permittee will not be permitted to continue to graze twice the number of permitted livestock on the Federal range for part of the allotted time where that practice is shown to be leading to a deterioration of the Federal range.

William Sellas, Appellant, B. H. Robison, Intervener, A-27508 (Feb. 5, 1958)

Where, on appeal from a range manager's award of grazing privileges for the 1953 and 1954 seasons, a hearing examiner determined the applicant's class 1 grazing privileges in accordance with the priority period designated in the range code, and thereafter a special rule with respect to the range involved was adopted which rule changed the priority period upon which class 1 privileges were to be determined for the future, the correctness of the hearing examiner's determination becomes moot.

Charles H. McChesney et al., A-27630 (May 28, 1958) 65 I. D. 231

GRAZING PERMITS AND LICENSES--Continued

ADJUDICATION--Continued

When it is necessary to reduce grazing privileges under Section 161.6(f) of the Federal Range Code, Class 2 licenses and permits, properly issued, stand on equal footing with Class 1 licenses and permits.

Interpretation of 43 CFR 161.6(f) Reduction of Grazing Privileges to Reach Carrying Capacity of an Area or Unit, M-36550 (Jan. 7, 1959)

/Memorandum from Regional Solicitor, Portland, Oregon, to Oregon State Supervisor, Bureau of Land Management./

Land which has been recognized as class 1 base supporting the issuance of a 10-year permit will not, on redetermination, be held to lack priority in the absence of clear and convincing evidence to that effect.

Where, on reexamination of grazing privileges, the priority of a portion of the private lands controlled and used by a livestock operator is not questioned because such land was listed in applications for grazing privileges filed before June 28, 1938, was recognized as class 1 base supporting the issuance of a term permit, and is still used as base, then the priority of all of the tracts of private land so controlled and used should be determined in accordance with the same criteria.

Sidney W. Nicholes, A-27918 (Aug. 7, 1959)

Where the amount of grazing privileges attached to base property has never been determined and where a part of that property is later sold, it is proper to determine, first, the amount of grazing privileges to which the entire property was entitled and, then, the amount of such privileges transferred as the result of the sale.

Glen L. and Harold C. Hutchinson et al., A-27786 (Aug. 31, 1959)

APPEALS

The cancellation of a grazing permit without according the permittee an opportunity to demonstrate or achieve compliance with lawful requirements is unlawful under section 9(b) of the Administrative Procedure Act except in cases of willfulness or those in which the public health, interest or safety requires otherwise; the departmental regulation that a decision canceling a grazing permit will not become effective pending disposition of a timely appeal precludes

GRAZING PERMITS AND LICENSES--Continued

APPEALS--Continued

the possibility of such a decision coming within the scope of the exception clause in section 9(b) of the Administrative Procedure Act.

Frank Halls, A. J. Redd, A-27133 (Sept. 8, 1955) 62 I. D. 344

An appeal from the denial of a protest against the issuance of a grazing license to another will be dismissed where the protestant fails to show in what manner allowance of the license would adversely affect his grazing privileges.

John and Adellie Manzonie, A-27307 (July 16, 1956)

Where a grazing applicant appeals to a hearing examiner from a decision of the range manager partially rejecting his application, the burden is upon the applicant to show by substantial evidence that the adjudication was improper.

E. L. Cord, DBA El Jiggs Ranch, A-27426 (June 25, 1957) 64 I. D. 232

An appeal from the denial of a protest against the construction of a fence in a grazing district is properly denied when the protestant fails to show that he is licensed to graze in the unit of the district where the fence was erected.

T. W. Smith, Frank J. Hatt and Bernard Iriart, A-27841 (Feb. 4, 1959)

As the Federal Range Code for Grazing Districts requires that notice of intention to appeal to the Director of the Bureau of Land Management from a decision of a hearing examiner must be filed within 10 days after the receipt of the hearing examiner's decision by the appellant, it is proper for the Director to dismiss an appeal to him where it is shown that the notice of intention to appeal was filed after the 10-day period had elapsed.

William S. Young et al., A-27894 (Mar. 13, 1959) 66 I. D. 113

GRAZING PERMITS AND LICENSES--Continued

APPORTIONMENT OF FEDERAL RANGE

A grazing permittee who appeals from a denial of an application for allotment of a specific area of the Federal Range should show, in addition to the fact that he used the area during the priority period, that he has not been allotted grazing privileges to which he is entitled or that exclusion from a specific area is detrimental to his livestock operation.

M. F. Sullivan et al., A-27329 (Aug. 20, 1956) 63 I. D. 269

Where the district area manager has apportioned newly available Federal range among several applicants upon the basis of Class 2 water, each of which applicants has water to service some or all of the land available, so that the land awarded each lies closest to his water, and there are no factors of good range management indicating another disposition, the allocation will not be disturbed upon appeal.

The fact that an allocation of Federal range leaves a section of privately controlled land isolated from the remainder of an operator's land does not of itself require a revision of the allocation.

Nestor Storey et al., A-27442 (July 1, 1957)

Where a permittee has been given all the grazing privileges to which he is entitled, he cannot complain of the allotment made to others or the area of use assigned to him.

C. A. George, Verva Bowen, A-27488 (Nov. 7, 1957)

Where a grazing permittee has been granted all of the grazing privileges to which he is entitled and has been permitted to exercise those grazing privileges in the vicinity of his land bases and some of his water bases, he has received all that he is entitled to under the Taylor Grazing Act and the Federal Range Code for grazing districts and he cannot complain that he has not been awarded another area of the Federal range for the exercise of his privileges.

William Sellas, Appellant, B. H. Robison, Intervener, A-27508 (Feb. 5, 1958)

BASE PROPERTY (LAND)

Generally

The cancellation of a 10-year grazing permit on the ground that the base lands lack dependency by use is erroneous where the evidence in the record as a whole does not support such a determination.

Frank Halls, A. J. Redd, A-27133 (Sept. 8, 1955) 62 I. D. 344

Patented mining claims of sufficient productivity to support base property qualifications may be designated as base property and used to support an application for Federal grazing privileges. Unpatented mining claims cannot be regarded as base property of a Federal range user because in the absence of patent the holder of a mining claim is without right to use the claim for grazing purposes.

Where grazing rights are acquired in excess of the commensurability of the lands to which such rights are transferred and the transferee thereafter acquires additional base property, the excess grazing rights cannot be attached to the after-acquired lands where the transferee fails within the time allowed him by the range manager to offer such lands in a transfer of such excess rights.

Base property may be invested with dependency by use by transfer from other property if the application for transfer of base property qualifications presented under section 161.7(b) of the Federal Range Code designates specific property owned or controlled by a transferee with sufficient productivity to support the qualifications to be transferred.

James G. Brown, M. H. Young, A-27635 (Sept. 24, 1958) 65 I. D. 394

Where, on reexamination of grazing privileges, the priority of a portion of the private lands controlled and used by a livestock operator is not questioned because such land was listed in applications for grazing privileges filed before June 28, 1938, was recognized as class 1 base supporting the issuance of a term permit, and is still used as base, then the priority of all of the tracts of private land so controlled and used should be determined in accordance with the same criteria.

Land which has been recognized as class 1 base supporting the issuance of a 10-year permit will not, on redetermination, be held to lack priority in the absence of clear and convincing evidence to that effect.

Sidney W. Nicholes, A-27918 (Aug. 7, 1959)

BASE PROPERTY (LAND)--Continued

Dependency by Use

Where a livestock operator sells his ranch, and as a part of the transaction he is entitled to use of the ranch for care of his sheep for an indeterminate time, use of the ranch under such an agreement may give the operator such control of the ranch that use of the land in conjunction with the Federal range will serve to vest the land with the attributes of land dependent by use.

Frank Halls, A. J. Redd, A-27133 (Sept. 8, 1955) 62 I. D. 344

Where the evidence establishes that property otherwise eligible for grazing privileges based upon its dependency by use was not offered as base land within the period required by the Federal Range Code, the property cannot be classified as dependent by use (Class 1).

Where dependency by use was created by the use of a ranch property as a whole, upon separation of the original operation into several units, the dependency by use attaches to the various units in proportion to the carrying capacity of those units in the absence of any evidence showing that such allocation is improper.

Henry McCleary Timber Co., et al., A-27146 (Nov. 7, 1955)

Where the dependency by use of base property is determined on the basis of the record of forest permits issued to the applicant's predecessors and the applicant shows that permits for additional livestock from the same base may have been overlooked but the evidence in the record is inconclusive, the case will be remanded for a redetermination of the priority of the base property.

Mahaffey Livestock, Inc., A-27441 (July 22, 1957) 64 I. D. 290

An application for an individual allotment of grazing privileges is properly rejected where the Federal range applied for is over-obligated to operators whose base property has dependency by use and is class 1 base, whereas the base property offered by the applicant is not class 1.

William Jensen et al., A-27498 (Nov. 15, 1957)

GRAZING PERMITS AND LICENSES--Continued

BASE PROPERTY (LAND)--Continued

Dependency by Use--Continued

The provision in the Federal Range Code that in the event of failure for 2 consecutive years to offer base in an application for a grazing license or permit, such property will lose its dependency by use or priority will be read independently of and as unaffected by the provision in the code that each year a time will be set before which applications for grazing privileges must be filed and that applications which are not filed on or before that date will be rejected for that year in the absence of a satisfactory showing justifying the late filing.

Where an application for grazing privileges is filed within 2 years after the base offered therein was first recognized as having priority, but the application was filed too late to be considered for an award of grazing privileges for the year in which it was filed, the application nonetheless satisfies the requirements of 43 CFR 161.6(c)(9) and prevents loss of priority of the base for failure to offer it in an application for 2 consecutive years.

Don C. Call, Lloyd Higley et al., A-27658 (Sept. 29, 1958) 65 I. D. 409

In order to qualify as lands dependent by use within the meaning of the Federal Range Code, it is necessary that land offered as base property shall have been used in connection with the same part of the public domain only during a substantial part of a qualifying year of the priority period.

Bert and Paul Smith, Roger Smith, A-27769 (Jan. 16, 1959) 66 I. D. 1

Where there has been no adjudication of commensurability of base property during the priority period and the earliest commensurability report in the official grazing files was not based on a dependent property survey, the commensurability rating of the base during the priority period will not be conclusively presumed to be that shown by the earliest commensurability report if there is other evidence in the record inconsistent with that report and the applicant whose grazing privileges are affected thereby requests an opportunity to submit evidence on the question.

Arthur V. Heller, A-27833 (Mar. 9, 1959) 66 I. D. 65

Where lands controlled by a livestock operator have been used and recognized as qualified class 1 base supporting the issuance of licenses

GRAZING PERMITS AND LICENSES--Continued

BASE PROPERTY (LAND)--Continued

Dependency by Use--Continued

and a term permit authorizing use of the Federal range for approximately 20 years, the priority of such lands may be recognized on the basis of prior administrative adjudications even though, on reexamination, evidence is lacking as to whether such lands were used as base during the priority period.

Sidney W. Nicholes, A-27918 (Aug. 7, 1959)

Ownership or Control

Where, under the special rule adopted for the classification of base property in Nevada Grazing District No. 4, total grazing privileges must be based on at least a two-thirds land base and not to exceed a one-third water base, a livestock operator with a limited land base has no cause for complaint because he does not receive grazing privileges based on all of the waters to which he claims a right.

William Sellas, Appellant, B. H. Robison, Intervener, A-27508 (Feb. 5, 1958)

Loss of ownership or control of property to which base property qualifications have attached results in the loss of such qualifications in the absence of a proper and timely application for transfer of such qualifications to specific property of sufficient productivity to receive them.

James G. Brown, M. H. Young, A-27635 (Sept. 24, 1958) 65 I. D. 394

One who sells a part of his base property to another is not entitled to retain all of the grazing privileges which he enjoyed in connection with the property prior to the sale.

Glen L. and Harold C. Hutchinson et al., A-27786 (Aug. 31, 1959)

BASE PROPERTY (WATER)

In Nevada Grazing District No. 4 the control of water alone is not sufficient to entitle a livestock operator to exercise grazing privileges in the district.

GRAZING PERMITS AND LICENSES--Continued

BASE PROPERTY (WATER)--Continued

Where, under the special rule adopted for the classification of base property in Nevada Grazing District No. 4, total grazing privileges must be based on at least a two-thirds land base and not to exceed a one-third water base, a livestock operator with a limited land base has no cause for complaint because he does not receive grazing privileges based on all of the waters to which he claims a right.

William Sellas, Appellant, B. H. Robison, Intervener, A-27508 (Feb. 5, 1958)

CANCELLATION AND REDUCTIONS

The cancellation of a grazing permit without first giving the permittee an opportunity to show cause why such cancellation should not be made final is contrary to departmental regulation.

The provision in the Federal Range Code authorizing certain officers, where the orderly administration of the range or other public interest requires, to make immediately effective a decision from which an appeal may be taken, does not apply to decisions canceling grazing licenses or permits.

Where a grazing permittee has been wrongfully denied use of the range for two grazing seasons under a 10-year grazing permit, the permittee will be granted use of the range for that length of time even though his permit has expired.

Frank Halls, A. J. Redd, A-27133 (Sept. 8, 1955) 62 I. D. 344

In order to enforce 43 CFR 161.6(e)(14)(ii)--concerning the payment or reimbursement of an equitable share of the cost of fence construction and maintenance by any licensee or permittee who will benefit in some substantial measure from the same--the district manager may, on expiration of a license or permit, condition its renewal on the payment or reimbursement, or he may seek to cancel an outstanding license or permit in accordance with 43 CFR 161.9(d).

Opinions Relating to Fence Construction and Free-Use Licenses on the Federal Range, M-36521 (June 27, 1958) (Memorandum from Field Solicitor, Salt Lake City, Utah, to State Supervisor for Utah, Bureau of Land Management.)

GRAZING PERMITS AND LICENSES--Continued

CANCELLATION AND REDUCTIONS--Continued

When it is necessary to reduce grazing privileges under Section 161.6(f) of the Federal Range Code, Class 2 licenses and permits, properly issued, stand on equal footing with Class 1 licenses and permits.

Interpretation of 43 CFR 161.6(f) Reduction of Grazing Privileges to Reach Carrying Capacity of an Area or Unit, M-36550 (Jan. 7, 1959)

/Memorandum from Regional Solicitor, Portland, Oregon, to Oregon State Supervisor, Bureau of Land Management./

Where grazing privileges have been allowed for a long period of time upon the basis that a showing sufficient to satisfy the requirements of the Federal Range Code had been made, such grazing privileges will not be canceled unless there is convincing evidence that the base property upon which the privileges are predicated was not qualified and that the action in granting the privileges was clearly erroneous.

Bert and Paul Smith, Roger Smith, A-27769 (Jan. 16, 1959) 66 I. D. 1

A grazing licensee who grazes a number of animals in excess of the number covered by his existing grazing license is properly charged with wilful trespass upon the public domain and subjected to disciplinary reduction of his grazing license where the circumstances do not comport with the notion that he acted in good faith and innocent mistake.

J. Leonard Neal, A-27922 (Jun. 4, 1959) 66 I. D. 215

A portion of a grazing permit is properly canceled when it appears that the land is suitable for disposition by public sale and partial cancellation of the permit will not unduly interfere with the permittee's livestock operations.

Herbert C. Rose, A-27917 (Jul. 22, 1959)

FEDERAL RANGE CODE

The provision in the Federal Range Code authorizing certain officers, where the orderly administration of the range or other public

FEDERAL RANGE CODE--Continued

interest requires, to make immediately effective a decision from which an appeal may be taken, does not apply to decisions canceling grazing licenses or permits.

Frank Halls, A. J. Redd, A-27133 (Sept. 8, 1955) 62 I. D. 344

Where subsequent to a decision of a hearing examiner a provision of the Federal Range Code relating to the method of computing the dependency by use or priority to be attached to base property is amended to provide a more liberal formula than that permitted under the terms of the previous code, the amended provision should be applied in adjudicating the future grazing privileges of an applicant for grazing rights.

Mahaffey Livestock, Inc., A-27441 (July 22, 1957) 64 I. D. 290

As the Federal Range Code for Grazing Districts requires that notice of intention to appeal to the Director of the Bureau of Land Management from a decision of the hearing examiner must be filed within 10 days after the receipt of the hearing examiner's decision by the appellant, it is proper for the Director to dismiss an appeal to him where it is shown that the notice of intention to appeal was filed after the 10-day period had elapsed.

William S. Young et al., A-27894 (Mar. 13, 1959) 66 I. D. 113

HEARINGS

Where the record shows that a grazing applicant knew prior to the time of the hearing on his appeal the precise issues involved in the hearing, he cannot later claim that he was not given proper notice of the issues involved in the hearing.

The official grazing files are public records of which the Department takes notice in rendering decisions but the probative value of the files depends upon the contents of the files.

Since the burden is upon an applicant for grazing privileges who appeals from the rejection of his application to show by substantial probative evidence that the rejection was improper, it is unnecessary to examine the Bureau's evidence on the issues involved if the appellant's evidence does not sustain his burden.

HEARINGS--Continued

In view of section 18 of the Taylor Grazing Act, which provides that local advisory boards shall give advice and recommendations on grazing applications, it seems certain that range managers may base their decisions largely or entirely upon hearsay or other evidence which would not be competent or admissible in court proceedings.

In an administrative proceeding, the strict common law rules of evidence do not apply and the fact that hearsay evidence is admitted will afford no basis for ordering a new hearing.

Although it has been held that under section 7(c) of the Administrative Procedure Act, an administrative finding cannot be based upon hearsay alone or hearsay corroborated only by a scintilla of evidence, it is questionable whether this principle applies to hearings in grazing cases in view of the fact that the hearings are held only on appeals and the appellant has the burden of proof.

E. L. Cord, DBA El Jiggs Ranch, A-27426 (June 25, 1957) 64 I. D. 232

SPECIAL DISTRICT RULES

Where a permittee has used her grazing privileges for many years for a class of livestock different from that for which grazing privileges were recognized for her predecessor under authority of the range manager and where the advisory board has recommended approval of such use and there was no protest against such transfer of use, it is too late to protest against the transfer of use on the grounds that the transfer of use did not technically comply with the requirements of a local district rule.

C. A. George, Verva Bowen, A-27488 (Nov. 7, 1957)

The provisions of section 4 of the Administrative Procedure Act relating to rule making do not apply to a special rule issued under the Federal Range Code and applicable to the range in a particular district because the rule involves use of the Federal range which is public property, and matters relating to public property are expressly excepted from the provisions governing rule making in section 4 of the Administrative Procedure Act.

GRAZING PERMITS AND LICENSES --Continued

SPECIAL DISTRICT RULES--Continued

The Federal Range Code provides that where local conditions in a district make necessary the adoption of a special rule on any of the matters in the range code, such a rule may be adopted for a particular district, and where a special rule is adopted which provides that a different priority period shall be used than the period provided in the code, and there are persuasive reasons in support of the adoption of such a rule, the award of grazing privileges in the district may be made in accordance with the special rule, there being no statutory requirement that any priority period be used in determining preferences in the issuance of grazing permits.

Wade McNeil et al., A-27439 (Nov. 19, 1957) 64 I. D. 423

Where, under the special rule adopted for the classification of base property in Nevada Grazing District No. 4, total grazing privileges must be based on at least a two-thirds land base and not to exceed a one-third water base, a livestock operator with a limited land base has no cause for complaint because he does not receive grazing privileges based on all of the waters to which he claims a right.

The special rule adopted for the classification of base properties in Nevada Grazing District No. 4 permits a combination of land and water as base property.

William Sellas, Appellant, B. H. Robison, Intervener, A-27508 (Feb. 5, 1958)

Where, on appeal from a range manager's award of grazing privileges for the 1953 and 1954 seasons, a hearing examiner determined the applicant's class 1 grazing privileges in accordance with the priority period designated in the range code, and thereafter a special rule with respect to the range involved was adopted which rule changed the priority period upon which class 1 privileges were to be determined for the future, the correctness of the hearing examiner's determination becomes moot.

Charles H. McChesney et al., A-27630 (May 28, 1958) 65 I. D. 231

GUAM

GENERALLY

The settled law applicable to tidelands and submerged lands adjacent to incorporated territories of the United States is equally applicable to the unincorporated territory of Guam.

In view of the controlling legal principles relative to tidelands and submerged lands adjacent to a territory of the United States, the language of the Guam Organic Act (48 U. S. C., 1952 ed., sec. 1421f) and transfers of land made pursuant thereto, may not be construed as vesting title or administration of tidelands or submerged lands, filled or otherwise, in the Government of Guam in the absence of specific authorization by the Congress.

Abutting upland property owners may not assert a claim of title, as against the United States, to either submerged lands or tidelands adjacent to Guam; nor may they assert similar claims of title as to land which results from the filling of submerged lands or tidelands by such owner, his predecessor, or the United States.

Rights of Abutting Upland Property Owners to Claim Title to Reclaimed Land Produced by Filling on Tidelands and Submerged Lands Adjacent to the Territory of Guam, M-36449 (Jan. 31, 1958) 65 I. D. 193

Public Law 60 of the Fourth Guam Legislature does not violate the provisions of the Organic Act of Guam prohibiting governmental financial support of religious institutions in the territory.

Section 5 of the Organic Act of Guam (64 Stat. 385; 48 U.S.C. sec. 1421b) insures the people of Guam basic human rights comparable to those reserved to the American people by the Bill of Rights in the Constitution of the United States.

Validity of Act of the Legislature of Guam Furnishing Textbooks Free of Charge to Students in Public and Private Elementary and Secondary Schools in Guam, M-36533 (Oct. 3, 1958)

HAWAII

GENERALLY

In the Hawaii Statehood Act, Congress specifically authorized persons holding Territorial legislative, executive, and judicial offices, as

HAWAII--Continued

GENERALLY--Continued

well as the Delegate in Congress, to continue to discharge the duties of their respective offices.

Applicability of the Hatch Act to the Governor of the Territory of Hawaii, M-36576 (June 12, 1959) 66 I. D. 281

GOVERNOR

The Territorial Governor of Hawaii is a "Territorial officer," "a person holding executive office in the Government of said Territory," and "an officer of said Territory."

The Territorial Governor of Hawaii is eligible to continue in that position while seeking an elective office under the new State government.

Applicability of the Hatch Act to the Governor of the Territory of Hawaii, M-36576 (June 12, 1959) 66 I. D. 281

HELIUM

The Helium Act and regulations prohibit sale by the Government of helium which is to be exported for use in an airship that will be operated solely in a foreign country.

Sale of Helium for Export, M-36281 (April 27, 1955)

The Helium Act (50 U.S.C. sec. 161) is less suitable than the Defense Production Act (50 U.S.C., App. 2061 et seq.) as a legal basis for operating a priorities and allocations system because the Helium Act lacks, while the Defense Production Act contains, adequate provisions for (a) control of helium use by the purchaser or his transferees, (b) diversion of helium from use by a Federal agency to a non-Federal consumer and vice versa, (c) exemptions from liability for breach of contract incurred in complying with priorities and allocations directives concerning helium, and (d) requiring rendition of information concerning helium stocks and uses.

HELIUM--Continued

Under the Helium Act (50 U.S.C. sec. 161), which requires the Bureau of Mines to dispose of helium to Federal agencies in preference over all other applications for purchase of helium, but permits the Bureau to give preference to any Federal agency over another Federal agency, and to the applications of any non-Federal applicant over another non-Federal applicant, the Bureau of Mines may, in effect, operate a partial priorities and allocations system effective as to direct recipients of helium from the Bureau.

Whether Authority Exists for Operating a Priorities and Allocation System for Helium Among Federal Agencies and Private Users, and What Delegations Would be Required to Enable the Bureau of Mines to Exercise Such Authority, M-36299 (Aug. 22, 1955) 62 I. D. 323

HOMESTEADS (ORDINARY)

(See also Enlarged Homesteads, Reclamation Homesteads, Soldier's Additional Homesteads, Stockraising Homesteads)

GENERALLY

The effective date of a period of suspension under Public Law 834 (act of July 30, 1956; 70 Stat. 715) is either (1) the date that notice is received from the entryman that he has suspended cultivation and improvement operations or (2) the date indicated by the entryman in his notice that he intends in the future to suspend such operations. The notice must contain a statement expressing the desire to suspend operations, information concerning cultivation and improvements on the entry, and a grant to the United States of a right to enter and occupy the land.

The anniversary date for filing annual proof after period of suspension will be determined by extending the previous anniversary date by an amount of time equal to the approved period of suspension.

Interpretation of Public Law 834 (Act of July 30, 1956; 70 Stat. 715), M-36469 (Sept. 16, 1957)

The reinstatement of a homestead entry revives the entry with all of the rights and privileges which have accrued from the time of its allowance.

Bruce Sweeney, A-27854 (Mar. 4, 1959)

HOMESTEADS (ORDINARY)--Continued

GENERALLY--Continued

Special use permits for the purpose of drilling wells to show the existence of irrigation water on public lands embraced in a homestead application may be allowed where the lands are suitable for agricultural production if sufficient water for irrigation can be found.

Joseph A. and Joseph Akren, A-28053 (Nov. 20, 1959)

APPLICATIONS

A receipt for filing fees tendered by an applicant for a homestead entry is merely an acknowledgment that the moneys have been received and does not constitute an authorization to enter or settle on the land applied for.

Arthur Halsted, A-27298 (May 21, 1956)

A homestead application is properly rejected where the applicant is disqualified under the law from holding an entry because he had a prior perfected entry which does not come within the Provisions of the act of June 21, 1934.

John B. Roeser, A-27961 (Aug. 3, 1959)

CANCELLATION OF ENTRY

Where an entryman fails to establish residence on his entry within 12 months from allowance of the entry, the entry must be canceled for failure to establish such residence.

Henry J. Ernst, A-27196 (Nov. 7, 1955)

Where an entry is canceled because it was erroneously allowed and the entryman has placed improvements on the tract, the entryman is entitled to reimbursement for any valuable improvements which he cannot remove without damage to the land or to the improvements from any person who subsequently may acquire the tract and to whom the improvements have value.

HOMESTEADS (ORDINARY)--Continued

CANCELLATION OF ENTRY--Continued

A homestead entry which was erroneously allowed on land reserved from any disposition under the public land laws is properly canceled.

Lewis Sanford Cass, A-27742 (Jan. 14, 1959)

CLASSIFICATION

It is proper to refuse to classify land for homestead entry when the land is needed for wildlife use in connection with a wildlife development plan on which the State of Oregon and this Department are cooperating, and the State has filed an application for a right-of-way to construct a dike across the land applied for to serve a part of a diking and drainage system to reclaim 8,000 acres of State-owned lands, and construction of the dike would render the land unsuitable for agricultural purposes.

Earl L. Wakefield, A-27049 (Jan. 12, 1955)

It is proper to refuse to classify land as suitable for homestead entry where by reason of the proximity of the land to the State capital and to resort areas and the fact that the land is blanketed by small tract applications, it appears that the land is more valuable for small tract uses.

Darwin M. Cecil, Joseph Casaletto, A-27047 (Jan. 14, 1955)

A homestead application is properly rejected where the lands applied for are unsuitable for cultivation because of loose sandy soil and rolling to hilly topography.

Dwight L. Wheeler, Polly Yarbrough, A-27046 (Jan. 31, 1955)

Land withdrawn by Executive Order No. 6910 which has been selected by a State in an exchange pursuant to section 8(c) of the Taylor Grazing Act, as amended, is not subject to classification for homestead purposes pursuant to section 7 of that act.

Joseph William Krall, A-27029 (Feb. 4, 1955)

HOMESTEADS (ORDINARY)--Continued

CLASSIFICATION--Continued

A homestead application is properly rejected where the land is unsuitable for the production of agricultural crops because of the high alkali or salt concentration, deep tight layers of clay soils, and the slow movement of water through the soils, causing restricted root growth.

Vernon W. Langley, A-27077 (Feb. 25, 1955)

Applications for homestead and desert-land entry will be remanded for a further field examination where there is insufficient evidence in the record regarding the suitability of the lands applied for for agricultural development.

Elmer Richard Wright et al., A-27020 et al. (Feb. 28, 1955)

Land which is desert in character and which is susceptible of successful cultivation by irrigation may be classified under section 7 of the Taylor Grazing Act for homestead entry upon the submission by the applicant of evidence of a water right and plans of irrigation sufficient to enable the applicant to meet the cultivation requirements of the homestead laws.

Willard Carl Sorenson, A-27086 (April 5, 1955)

A homestead application is properly rejected where the land applied for consists of loose, sandy soil and the amount of the land which might be cultivated is not sufficient to meet the minimum cultivation requirements.

Richard Wright, A-27136 (June 28, 1955)

A homestead application is properly rejected where the land applied for is unsuitable for cultivation because of rolling topography and a guin type soil which easily erodes when the ground cover is broken, the land contains less than the minimum cultivable acreage required by the homestead law, and the land is more suitable for timber production.

M. W. McKenzie, Jr., A-27149 (July 14, 1955)

HOMESTEADS (ORDINARY)--Continued

CLASSIFICATION--Continued

A homestead application is properly rejected where the land applied for is unsuitable for agricultural development because of low fertility and poor drainage and the land is more valuable for timber production and disposal by public sale.

Fred Glenn, Jr., A-27253 (Feb. 6, 1956)

An application for homestead entry is properly rejected where it appears that the land applied for is more valuable for its timber resources and timber production than for farming, and the land has been classified as suitable for disposal by public sale.

The fact that a tract of land is too small to constitute an economic farm unit is not a proper basis for classifying it as unsuitable for homestead entry if the applicant for the land owns adjoining land which, together with the land applied for, will constitute an economic farm unit.

Dennis C. Towns, A-27262 (Mar. 2, 1956)

A homestead application is properly rejected where the land applied for is unsuitable for cultivation because of a sterile, sandy soil which is lacking in organic matter.

John P. Mitchell, A-27266 (Mar. 2, 1956)

It is proper to refuse to classify land for homestead entry where the land may be subject to erosion if cultivation takes place, and the land should be retained in Federal ownership to protect erosion detention structures constructed by the United States on nearby lands.

Ray White Edington, A-27202 (Mar. 12, 1956)

A homestead application is properly rejected where it appears that the land applied for is rough, steep land, having only marginal value for agriculture, and the land is chiefly valuable for timber production.

Vernon G. Golden, A-27248 (Mar. 12, 1956)

HOMESTEADS (ORDINARY)--Continued

CLASSIFICATION--Continued

Land will not be classified as suitable for homestead entry where the soil is composed of infertile, sandy soil which is subject to severe wind erosion if cultivated, similar surrounding land has been abandoned for cultivation, and the land is more suitable for grazing than for farming.

Arthur Halsted, A-27298 (May 21, 1956)

Where land applied for under the Homestead Act is classified as unsuitable for agricultural production because it has a sandy, gravelly soil, short growing season, and furnishes public access to a river highly valued for its recreational use, the classification will not be disturbed in the absence of positive evidence that the classification is erroneous.

Harry E. Andersen, A-27313 (June 14, 1956)

It is proper to refuse to classify land for homestead entry where water conditions are such that it is doubtful that the land could be developed economically for agricultural purposes, and the land appears to be more suitable for disposition under the terms of the Small Tract Act.

William John Mauro, A-27318 (July 13, 1956)

Where land applied for under the Homestead Act is classified as unsuitable for agricultural production because of steep topography, a short growing season, and adverse climate, the classification will not be disturbed in the absence of positive evidence that the classification is erroneous.

Gene Edwin Simpson, A-27352 (Aug. 13, 1956)

An application for homestead entry on an island is properly rejected where the land has a poor, infertile soil consisting of coral and silica sand, and removal of the dense tropical growth on the island would result in rapid decomposition and leaching of any humus present.

Herbert R. Karns, A-27367 (Nov. 9, 1956)

An application for homestead entry is properly rejected where the land applied for has insufficient rainfall for the sustained production of crops by dry farming, the soil is easily eroded

HOMESTEADS (ORDINARY)--Continued

CLASSIFICATION--Continued

because of its excessive slope, and irrigation of the land is not possible because of lack of water and the slope of the land.

Walter E. Woods, T. E. and Ennis Matthews, A-27376 (Feb. 12, 1957)

Desert land and homestead applications are properly rejected where the lands applied for are later included in a declared underground water basin in which further appropriations of underground water for irrigation, municipal and industrial purposes is forbidden under State law. Such action is proper even though some of the applicants have applications pending with the State Engineer for permits to appropriate underground water, which permits may have to be granted under State law.

Where desert land and homestead applications are rejected by the Director, Bureau of Land Management, on the basis of a finding that there is insufficient ground water available for the development and reclamation of the lands applied for, and it is shown on appeal to the Secretary of the Interior that there is sufficient water for some of the applications, the entries will be allowed if other requirements are met.

Marvin P. Mitchell et al., A-27263 (Mar. 5, 1957)

Homestead applications for Oregon and California railroad grant lands are properly rejected where the lands are unsuitable for agricultural purposes and are more valuable for timber production.

Warren H. Goss, Neil N. Sumner, A-27418 (Mar. 18, 1957)

The classification of land as unsuitable for homestead entry is proper where it is shown that the land cannot be cultivated without irrigation and where no adequate showing has been made that water is available for such irrigation.

Andrew T. Johnson et al., A-27305 (Sept. 25, 1957)

A homestead application is properly rejected where it appears that the land is partly swampy in character and the balance is composed of infertile sandy soil part of which is inundated during rainy seasons.

William Palmer Lamb, A-27499 (Nov. 13, 1957)

HOMESTEADS (ORDINARY)--Continued

CLASSIFICATION--Continued

An application for homestead entry is properly rejected where the land applied for is located in a floodway which renders it subject to periodic and frequent flooding, making it unsuitable for cultivation, residence, and the construction of permanent improvements.

Luther M. Gann, A-27513 (Jan. 16, 1958)

The classification of land as unsuitable for homestead entry is proper where it is shown that the land cannot be cultivated without irrigation and where no adequate showing has been made that water is available for such irrigation.

James Etcheverry, Jr., A-27642 (Aug. 26, 1958)

An application for homestead entry is properly rejected where it appears that the land applied for is more valuable for its timber resources and timber production than for agricultural use, and the land has been classified for retention in Federal ownership as a part of a sustained yield forest management program.

Floyd J. Brown, A-27684 (Sept. 22, 1958)

Where land may be properly classified for either homestead or desert land entry and an application for homestead entry is filed before the filing of a conflicting desert land application, the classification of the land for homestead entry will not be modified in the absence of evidence that the classification is incorrect.

W. E. Buell, A-27700 (Oct. 27, 1958)

Homestead and desert land applications are properly rejected when the lands applied for are included in a reseeding project and allowance of the entries would destroy the project and violate the pledge of the United States to cooperate with the State wherein the lands are located for the duration of the reseeding project.

Don L. Wilson, Rodney Eugene Wilson, A-27723 (Dec. 12, 1958)

Classification of land applied for under the homestead law as unsuitable for agricultural production because of poor soil and excessive slopes which permit ready erosion will not be disturbed in the absence of positive evidence that the classification is erroneous.

John G. Gibbs, A-27855 (Feb. 19, 1959)

HOMESTEADS (ORDINARY)--Continued

CLASSIFICATION--Continued

An application for homestead entry is properly rejected where the land is too rough and mountainous for cultivation without severe erosion which would contribute to siltation of a reservoir and the applicant relies upon sources of irrigation water not available to him.

James C. Mouat, A-27943 (Jun. 15, 1959)

An application for homestead entry may be allowed where the record indicates that the land can be cultivated by dry farming and all else is regular; such an application will not be rejected solely on the ground that it may be doubtful whether, over a period of time, the land will comprise an economic farm unit capable of supporting a person or a family.

Warren G. Boyer, A-27707 (Jun. 17, 1959)

Where an application for homestead entry was rejected because the land was classified as unsuitable for cultivation, and, on appeal, the applicant submits substantial evidence that the land may be suitable for crop production and requests an opportunity to present additional evidence in support of his application, the rejection of the application will be set aside and the case will be remanded for further consideration after the appellant is given the opportunity to submit additional evidence.

Max J. Curtis, A-27843 (Aug. 11, 1959)

Where a homestead application was rejected by the land office manager for the reason that the land was classified as suitable for retention in Federal ownership because it is needed in aid of an important watershed program, and the Director of the Bureau of Land Management affirmed the rejection on the ground that the applicant did not submit evidence required with his application and, on appeal, the applicant submits evidence indicating that no part of the land applied for is included within the area designated for land treatment measures under the watershed work program and also submits evidence correcting any defect in his application, the rejection of the application will be set aside and the case remanded for determination of the suitability of the land for homestead entry.

Edwin H. Richardson, A-27989 (Aug. 17, 1959)

An application for homestead entry of land which is primarily valuable for timber production and has been classified for retention in Federal ownership for disposal in aid of a Federal program or as school indemnity selections for incorporation in a State forest is properly rejected.

Paul A. Green, A-28075 (Oct. 16, 1959)

HOMESTEADS (ORDINARY)--Continued

CLASSIFICATION--Continued

Where homestead applications are rejected on the ground that lands applied for are not suitable for classification as agricultural lands in the absence of a showing of the existence of sufficient ground water to irrigate the lands, but the applicants are allowed the right to apply for special use permits to drill wells on the lands, and on appeal to the Secretary the applicants request that the special use permits be issued to them, the case will be remanded to the Bureau for a determination as to whether the lands may be classified as agricultural in character upon the condition that the applicants are successful in showing the existence of sufficient water to irrigate them.

Joseph A. and Joseph Akren, A-28053 (Nov. 20, 1959)

Applications for a grazing lease on and the public sale of a tract of land which has been classified as suitable for homestead entry are properly rejected in the absence of positive evidence that the classification is incorrect, or that allowance of the homestead entry would be against the public interest.

Otto L. Dean, A-28045 (Dec. 1, 1959)

CONTESTS

A contest against a homestead entry will be dismissed where the application to contest is not corroborated by the affidavit of a witness stating that he has personal knowledge of facts set forth in his affidavit which, if established, would render the entry subject to cancellation.

William Dittman, Henry N. Kvalvik, A-27312 (June 25, 1956)

If a homestead entryman goes into military service after a contest is initiated against his entry, the contest will not be dismissed but the proceedings will be suspended during his period of military service.

Under the regulations of the Department a contest can be initiated against a homestead entry on grounds other than abandonment although the entryman has gone into military service.

David H. Evans et al., A-27353 (Oct. 31, 1956) 63 I. D. 352

HOMESTEADS (ORDINARY)--Continued

CULTIVATION

Where the heirs of a deceased entryman have not informed the manager of the land office within the time allowed by the pertinent regulation of misfortunes which it is alleged justify a reduction in the requirements as to cultivation and where only one of four heirs has met with misfortune, it is proper to refuse to grant a reduction in the requirements as to cultivation.

Final proof on a homestead entry must be rejected where the statutory requirements as to cultivation have not been met by the heirs of the deceased entryman.

Heirs of Henry W. Stoneham et al., A-27230 (Dec. 12, 1955)

Where an entryman claiming credit for 2 years' military service under the act of September 27, 1944, on an entry made before June 16, 1954, complied with the residence requirements of the homestead law, has a habitable house on the entry, cultivated some land for each year and one-eighth of the entry area during the final entry year, and where facts are asserted which, if established, would justify reduction of cultivation required during the fourth entry year, a patent may be issued on the entry upon submission of evidence of military service and evidence justifying a reduction of cultivation for the fourth entry year.

The regulatory provision in 43 CFR 181.39(a) that if a World War II veteran who is entitled to the benefits of the act of September 27, 1944, makes homestead entry but "delays the submission of proof beyond the period for which residence is required, the cultivation necessary during each annual cultivable season elapsing or reached before the submission of final proof must be shown" means cultivation necessary under the homestead laws, as modified by the act of September 27, 1944, which provides that qualified veterans shall have the period of military service, not exceeding 2 years, construed to be equivalent to residence and cultivation upon the land for the same length of time.

Walter H. Bullwinkle, Joseph E. Vogler, A-27285 (June 18, 1956) 63 I. D. 172

Where the cultivable acreage in a homestead entry is less than the minimum acreage required to be cultivated under the homestead law but the entryman fails even to cultivate all the acreage that is cultivable, no reduction in the cultivation requirement to the actual acreage cultivated by him is justifiable so as to make acceptable his final proof on his entry.

Andy A. Lee, A-27685 (Dec. 3, 1958)

HOMESTEADS (ORDINARY) --Continued

FINAL PROOF

Where an entryman fails to appeal from the rejection of his final proof based upon his failure to comply with a condition improperly imposed upon him more than 2 years after the date of the register's receipt, he loses whatever rights he had under his final proof.

Garth L. Wilhelm et al., A-27018 (Feb. 9, 1955) 62 I. D. 27

Where a homestead entryman fails to submit final proof within the statutory period, the Bureau of Land Management, prior to taking cancellation action on the entry and as a matter of sound policy, should serve notice calling upon the entryman to submit the requisite final proof under penalty of cancellation of the entry. The Bureau's obligation is reasonably and adequately met if the notice is sent by either registered or certified mail to the entryman's last address of record, notwithstanding the notice is eventually returned "unclaimed."

Evidence of Service for Closing Entries, M-36459 (July 23, 1957)

A protest against the acceptance of final proof and issuance of final certificate and patent to a homestead entryman is properly rejected where the sole basis of the protest is a contention that the protestant has a claim of right under State law to use a well located on the entry.

Hatch Brothers Company, Leland R. Gamble, A-27525 (Jan. 13, 1958)

LANDS SUBJECT TO

Where land applied for in a homestead application is embraced in a first form reclamation withdrawal, the application is properly rejected.

Alma Everett Morris, Jr., et al., A-27235 (Dec. 12, 1955)

Unauthorized settlement on public land that has been withdrawn from settlement or entry confers no rights upon the settler.

Arthur Halsted, A-27298 (May 21, 1956)

HOMESTEADS (ORDINARY) --Continued

LANDS SUBJECT TO--Continued

Where the Commissioner of Reclamation revokes a reclamation withdrawal under authority delegated by the Secretary of the Interior which delegation of authority requires the concurrence by the Bureau of Land Management in the action taken by the Commissioner of Reclamation, the land remains withdrawn until that concurrence is given and applications for homestead entries on the land must be rejected.

Roy B. Stephenson, A-27637 (Aug. 7, 1958)

The signing of a revocation order by the Commissioner of Reclamation under authority delegated by the Secretary of the Interior, which delegation requires concurrence by the Bureau of Land Management, does not effect a revocation of a reclamation withdrawal until such concurrence is given and applications for homestead entry on the withdrawn land must be rejected.

George Francis Walters, A-27798 (Dec. 23, 1958)

A homestead entry which was erroneously allowed on land reserved from any disposition under the public land laws is properly canceled.

Lewis Sanford Cass, A-27742 (Jan. 14, 1959)

A homestead application is properly rejected for lands shown by the records to be within a Mexican land grant confirmed in accordance with the act of March 3, 1851, because such lands did not become public lands.

Richard P. Woitke, A-27875 (Apr. 2, 1959)

An application for homestead entry must be rejected where the land applied for is reserved from entry pending issuance of a classification order authorizing its disposition under the Small Tract Act, the Alaska Public Sale Act, or the Recreation Act.

William C. Bear, A-27999 (Aug. 6, 1959)

Lands embraced in stock-driveway withdrawal are not open to homestead entry and a homestead application for such lands is properly rejected.

Bessie S. Lynn, A-28055 (Oct. 12, 1959)

MILITARY SERVICE

The regulatory provision in 43 CFR 181.39(a) that if a World War II veteran who is entitled to the benefits of the act of September 27, 1944, makes homestead entry but "delays the submission of proof beyond the period for which residence is required, the cultivation necessary during each annual cultivable season elapsing or reached before the submission of final proof must be shown" means cultivation necessary under the homestead laws, as modified by the act of September 27, 1944, which provides that qualified veterans shall have the period of military service, not exceeding 2 years, construed to be equivalent to residence and cultivation upon the land for the same length of time.

Where an entryman claiming credit for 2 years' military service under the act of September 27, 1944, on an entry made before June 16, 1954, complied with the residence requirements of the homestead law, has a habitable house on the entry, cultivated some land for each year and one-eighth of the entry area during the final entry year, and where facts are asserted which, if established, would justify reduction of cultivation required during the fourth entry year, a patent may be issued on the entry upon submission of evidence of military service and evidence justifying a reduction of cultivation for the fourth entry year.

Walter H. Bullwinkle, Joseph E. Vogler, A-27285 (June 18, 1956) 63 I. D. 172

A person who, in addition to regular college courses, is enrolled in advanced ROTC under an agreement to continue taking such courses, to accept a reserve commission, and thereafter to serve 2 years on active duty is not engaged in military service within the meaning of the provision of the Soldiers' and Sailors' Civil Relief Act that military service includes education and training under the supervision of the United States preliminary to induction; and one who succeeds to the rights of an entryman, while taking advanced ROTC, cannot be considered to have initiated or acquired such rights during a period of military service as defined by the Relief Act.

The Soldiers' and Sailors' Civil Relief Act of 1940 does not protect a homestead entryman from failures to comply with the homestead laws before he enters military service.

David H. Evans et al., A-27353 (Oct. 31, 1956) 63 I. D. 352

MINERAL RESERVATION

Where land within a reclamation homestead entry is reported to be prospectively valuable for oil and gas at and subsequent to the time when the entryman filed satisfactory reclamation final proof, it is proper to require the entryman to file a consent to a reservation in the United States of the oil and gas in the land covered by the entry.

Where an entryman fails to appeal from the rejection of his final proof under which he would have been entitled to an unrestricted patent and the land is later reported to be valuable for oil and gas at and subsequent to the time when he later files another final proof, it is proper to require the entryman to file a consent to a reservation of the oil and gas to the United States in the land covered by the entry.

Garth L. Wilhelm et al., A-27018 (Feb. 9, 1955) 62 I. D. 27

RESIDENCE

The requirement of the homestead law that the entryman must establish residence on his entry within a maximum period of 12 months from the allowance of his entry is not satisfied by acts of clearing the land and preparing a foundation for a house, where the entryman fails actually to reside upon the land.

Henry J. Ernst, A-27196 (Nov. 7, 1955)

A homestead entryman cannot count as residence on his entry residence by him on the land at a prior time when the land was included in the entry of another. Query, whether he can count any prior period of residence which was discontinued before his entry was allowed.

Marvin E. Powell, A-27[illegible]0 (Nov. 19, 1957)

SETTLEMENT

Unauthorized settlement on public land that has been withdrawn from settlement or entry confers no rights upon the settler.

Arthur Halsted, A-27298 (May 21, 1956)

HOMESTEADS (ORDINARY)--Continued

SETTLEMENT--Continued

An applicant for homestead entry has no right to enter upon the land prior to its classification as suitable for entry and he gains no rights by such premature entry.

William Palmer Lamb, A-27499 (Nov. 13, 1957)

A notice of location of a homestead settlement on public lands in Alaska is properly rejected where the land involved is withdrawn from settlement, location, sale and entry, and reserved for classification.

Eugene T. Meyer, A-27729 (Dec. 17, 1958)

INDIAN ALLOTMENTS ON PUBLIC DOMAIN

GENERALLY

Public domain allotments made subsequent to the creation of the State in which situated and which were never a part of an Indian reservation would be subject to the laws of the State in the acquisition of a water right for such land.

Water Rights for Indian Allotments on Ceded Lands and Public Domain, M-36289 (Aug. 19, 1955)

Where an application for indemnity selection was filed by a State some 26 months prior to unauthorized settlement on the selected land by Indians claiming an interest under the Indian Allotment Act and the land is properly classified as suitable for indemnity selection, the Indian allotment applications are properly rejected.

Alexander Bateman et al., A-27203 (Nov. 9, 1955)

The allotment right of an Indian in Alaska under the act of May 17, 1906 (48 U.S.C. sec. 357), is limited to a single entry and may not include incontiguous tracts of public land.

Indian Allotments in Alaska, M-36352 (June 27, 1956)

INDIAN ALLOTMENTS ON PUBLIC DOMAIN--Continued

GENERALLY--Continued

Where a person asserting a prior and better claim to lands covered by a trust patent issued on an Indian allotment and an application for an allotment fails to submit charges against the patent and application in accordance with the regulations, he may not bring a contest against them on the ground that the Indian misrepresented the facts as to his settlement and improvements although the Department decides to hold a hearing on this matter.

Theodosia F. Caldwell et al., A-27706 (Dec. 16, 1958)

CLASSIFICATION

An application for an Indian allotment covering a 40-acre tract of Oregon and California revested grant land which contains over 1,000 M. bd. ft. of mature and second growth timber valued at $30,000 and which may be administered as part of a sustained yield unit is properly rejected since the tract is more suitable for timber production than for agricultural use.

John Johnson, A-26823 (Supp.) (Dec. 18, 1956)

LANDS SUBJECT TO

Public lands which have been withdrawn from entry by Executive Order 6910 are not subject to Indian allotment or settlement until such time as the lands are classified as suitable for such purpose under section 7 of the Taylor Grazing Act.

Alexander Bateman et al., A-27203 (Nov. 9, 1955)

SETTLEMENT

Settlement on public lands withdrawn by Executive Order 6910 prior to classification of such lands as suitable for Indian allotment will not confer upon the Indian settler any equitable interest in the land which will take precedence over any other application for the land.

Alexander Bateman et al., A-27203 (Nov. 9, 1955)

INDIAN LANDS

GENERALLY

The act of August 9, 1955 (69 Stat. 540), applies generally to the leasing of restricted Indian lands wherever situated, including reservations such as the Crow Reservation, where special leasing statutes had theretofore been enacted, thus supplying additional leasing authority without displacing or superseding the special statutes.

Application of the General Leasing Act of August 9, 1955 (69 Stat. 540), to the Crow Indian Reservation, Montana, M-36318 (Dec. 15, 1955) 62 I. D. 469

Under section XI of the act of September 3, 1954 (68 Stat. 1191), lessee Indians within the taking area of the Oahe Dam and reservoir project must continue to pay rent during the period the lands continue to be used under the provisions of this section.

The phrase "all members of said tribe who are residents of the Cheyenne River Sioux Reservation at the time of the passage of this Act," means those members of the tribe who actually resided on the reservation and maintained their homes there to the exclusion of members of the tribe who maintain permanent residence elsewhere.

Although the legislative history of an act of Congress may not be drawn upon to establish a meaning or intent contrary to the clear language of the act, this rule is without application where the legislative history supports, rather than disregards, the clear language of the statute.

The benefits of section XI of the act of September 3, 1954, may not be extended to Indians who own no land within the taking area of the Oahe Dam project.

Section XI of the act of September 3, 1954, does not authorize the purchase of lands in a trust status as a substitute for land in the taking area of the Oahe project which is held by an individual member of the Cheyenne River Sioux Tribe in unrestricted fee simple ownership. Memorandum Opinion of March 2, 1955, reconsidered and affirmed.

Interpretation of the Cheyenne River Act of September 3, 1954 (68 Stat. 1191), M-36323 (Jan. 12, 1956) 63 I. D. 7

GENERALLY--Continued

Where the United States acquires title to land in trust for an Indian tribe, the tribe is the beneficial owner of the land and such ownership is sufficient to entitle it to assert a preference right claim to purchase adjoining public land which is offered for sale.

Howard M. Wilson, The Navajo Tribe, A-27233 (Jan. 23, 1956) 63 I. D. 36

The bed of a navigable river does not pass to a State in its entirety upon the State's admission to the Union where prior to that time a portion of the bed was included in an Indian reservation.

Mrs. Grace F. Holbeck et al., A-27361 (Oct. 31, 1956)

An Indian reservation established pursuant to the inherent or implied power of the Executive to make withdrawals of public lands in the public interest, including the withdrawal of lands for Indian use, is not subject to the limitations and conditions contained in the act of June 25, 1910, and the reservation lands are not open to the mining of metalliferous minerals, as provided in that act.

Application of the act of June 25, 1910, to the Klukwan Indian Reservation in Alaska, M-36396 (Dec. 13, 1956)

In determining the boundaries of an Indian reservation the recognition by the Interior Department of a boundary as such for a period of many years will be deemed controlling.

Availability of Lands for Oil and Gas Leasing--Boundaries of the Fort Peck Indian Reservation, M-36539 (Nov. 19, 1958)

ALLOTMENTS

Generally

An allotment to an Indian of the Colville Reservation made under section 4 of the act of July 1, 1892 (27 Stat. 62), on the ceded area of the reservation became entitled to share in the available waters for the irrigation thereof under the doctrine of the Winters case.

Water Rights for Indian Allotments on Ceded Lands and Public Domain, M-36289 (Aug. 19, 1955)

INDIAN LANDS--Continued

ALLOTMENTS--Continued

Generally--Continued

Land reserved "for government and school purposes" and included in the schedule of allotments to individual Indians of the Tonkawa Tribe as a supplemental schedule, is excepted from the land ceded by the Tonkawa Tribe by Agreement of October 21, 1891, which specifically incorporates such schedule thereinto; and the act of Congress of March 3, 1893 (27 Stat. 644), accepting, confirming and ratifying that agreement, determines the right of the Tonkawas to such excepted land.

Title to Land Reserved for Government and School Purposes on the Tonkawa Reservation, Oklahoma, M-36353 (June 26, 1956)

Where certain Indian tribes or bands have, or appear to have, an interest in such reserved land, approval by such Indians of the disposition thereof, or of a re-designation of the purpose of reservation, should first be obtained.

Status of Lands Reserved for School, Agency, and Cemetery Purposes on Kiowa, Comanche and Apache Reservation in Oklahoma, M-36387 (Dec. 17, 1956)

In exchanges of land between the Blackfeet Tribe and its individual members, occurring between the Supplemental Allotment Act of June 30, 1919, and June 18, 1934, the date of the enactment of the Indian Reorganization Act, the question whether mineral reservations should be included in, or excluded from, patents issued to the individual members is controlled by rules issued by the Secretary of the Interior on October 3, 1925.

Ownership of Minerals Underlying Lands on the Blackfeet Indian Reservation in Montana as Between the Blackfeet Tribe and Individual Members of the Tribe, M-36393 (Dec. 26, 1956) 63 I. D. 408

Alienation

Where a statute directs the Secretary to allot lands to Indians and an Indian complies therewith and makes a selection of an allotment, the Indian has a legal right to the issuance of an appropriate patent, the terms and conditions of

INDIAN LANDS--Continued

ALLOTMENTS--Continued

Alienation--Continued

which will reflect privileges and disabilities accruing as of the date of completion of the selection formalities by the Indian.

Interpretation of the act of March 1, 1907 (34 Stat. 1015, 1035), as to Ownership of Mineral Rights Within the Blackfeet Indian Reservation in Montana, M-36325 (Jan. 23, 1956)

Where an attempted gratuitous conveyance of restricted Indian lands was refused approval by an authorized officer of the Department during the Indian owner's lifetime, and no appeal was taken from such refusal, it was proper upon the Indian's death to include the lands as a part of his estate subject to probate since the deeds were ineffectual.

Estate of Ortego Lopez, IA-860 (Apr. 4, 1958)

Patents

The Secretary may issue a patent in fee to Indians for allotments of lands held under an exchange assignment under the conditions prescribed in sec. 4 with or without the application of the Indian owners thereof.

Interpretation of Sections 3 and 4 of Public Law 461, 83d Congress, Second Session, Approved June 30, 1954 (Fort Peck) /68 Stat. 358, 359/, M-36267 (Feb. 11, 1955)

In issuing trust patents for allotments under the act of March 3, 1921 (41 Stat. 1455), the Department reasonably construed sections 4 and 6 as requiring a mineral reservation to the tribe only when the allotted lands were classified as mineral in character.

Reservation of Minerals to the Fort Belknap Tribe in Allotment Patents on the Fort Belknap Reservation, M-36291 (July 11, 1955)

Where a statute directs the Secretary to allot lands to Indians and an Indian complies therewith and makes a selection of an allotment, the Indian has a legal right to the issuance of an

INDIAN LANDS--Continued

ALLOTMENTS--Continued

Patents--Continued

appropriate patent, the terms and conditions of which will reflect privileges and disabilities accruing as of the date of completion of the selection formalities by the Indian.

Interpretation of the act of March 1, 1907 (34 Stat. 1015, 1035), as to Ownership of Mineral Rights Within the Blackfeet Indian Reservation in Montana, M-36325 (Jan. 23, 1956)

Right to Receive

The issuance of a trust patent for an Indian allotment carries with it a presumption of proper performance as well as the implied finding of every fact made a prerequisite to the patent's issue. Held, an allotment of land to an Indian is presumed to have been regularly made and will not be set aside after 37 years in the absence of clear evidence of mistake.

Placid Oil Company, IA-153 (May 27, 1955)

Where a statute directs the Secretary to allot lands to Indians and an Indian complies therewith and makes a selection of an allotment, the Indian has a legal right to the issuance of an appropriate patent, the terms and conditions of which will reflect privileges and disabilities accruing as of the date of completion of the selection formalities by the Indian.

Interpretation of the act of March 1, 1907 (34 Stat. 1015, 1035), as to Ownership of Mineral Rights Within the Blackfeet Indian Reservation in Montana, M-36325 (Jan. 23, 1956)

CEDED LANDS

An allotment to an Indian of the Colville Reservation made under section 4 of the act of July 1, 1892 (27 Stat. 62), on the ceded area of the reservation became entitled to share in the available waters for the irrigation thereof under the doctrine of the Winters case.

Water Rights for Indian Allotments on Ceded Lands and Public Domain, M-36289 (Aug. 19, 1955)

INDIAN LANDS--Continued

CEDED LANDS--Continued

Chippewa Indian lands ceded to the United States pursuant to acts of January 14, 1889 (25 Stat. 642), and February 20, 1904 (33 Stat. 46, 50), did not become "public lands" of the United States, but remained Indian lands until actually disposed of by the United States pursuant to the cession acts under which the United States acted as trustee for the Indians.

Presidential Proclamations of January 15, 1908 (35 Stat. 2189), and May 3, 1912 (37 Stat. 1741), setting aside a 60-foot strip of public land between the United States and Canada did not include therein ceded Indian lands as such lands were not unentered or unreserved public lands of the United States.

The unentered and undisposed of ceded Indian lands of the Red Lake Indian Reservation restored to the Indians and to their reservation by Secretarial order of February 22, 1945, issued pursuant to sections 3 and 7 of the Indian Reorganization Act (48 Stat. 984), as amended, were properly restored to Indian ownership, and the timber on such restored lands may be sold under applicable laws and regulations.

Status of Land Lying Within a Defined 60-foot Boundary Line Between the United States and Canada, M-36368 (Sept. 12, 1956)

The act of July 17, 1914, permitting the appropriation and patenting, with a mineral reservation in the United States, under the nonmineral land laws of lands withdrawn, classified, or valuable for specified minerals is not applicable to the restoration of ceded Indian lands to tribal ownership under the Indian Reorganization Act.

Arthur F. C. Hoffman, A-27541 (Feb. 7, 1958)

The Mineral Leasing Act of 1920 (30 U.S.C. 181, et seq.) normally applies to ceded Indian lands where the cession is absolute.

Originally ceded lands as to which the United States has never parted with title cannot be considered to be "acquired lands" within the meaning of the Mineral Leasing Act for Acquired Lands.

Leasability of Ceded Lands Used by the United States for the Benefit of the Indians, M-36540 (Jan. 8, 1959)

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION

Generally

Claims against the estate of a deceased Indian which are not filed prior to the date of the hearing cannot be considered by an Examiner of Inheritance on petition for rehearing.

Oscar Bad Warrior, IA-173 (April 11, 1955)

Estate of Kenneth Drags Wolf, IA-451 (Aug. 2, 1955)

An Examiner's determination of a question of fact such as the paternity of a child which is based on strong evidence adduced at the hearing, and not refuted by the appellants, will not be disturbed on appeal.

Oscar Bad Warrior, IA-173 (April 11, 1955)

A claim for care of a deceased minor Indian must be disallowed when the claimant is the grandmother of the decedent and the record shows that the services were gratuitous.

Estate of Coralana Ironnecklace, IA-306 (May 10, 1955)

The denial by an Examiner of Inheritance of a State's claim for reimbursement of old age assistance payments will be reversed upon appeal where such denial is in direct conflict with the departmental policy of allowing such claims to the extent of funds to the credit of the decedent's account at the time of death or from funds subsequently accruing from decedent's restricted allotted or inherited lands.

Estate of Josephine Iron Heart, IA-377 (Aug. 25, 1955)

A petition for rehearing filed in the estate of a deceased Indian which seeks to modify the inventory of the estate and exclude property acquired by the decedent by inheritance in probate proceedings completed 17 years earlier, is properly treated as a petition to reopen the earlier proceedings, and will be denied when it is not timely filed under the regulations applicable to reopening the earlier proceedings.

Estate of Abbie McDonald Kemble LeClair, Deceased Ponca Allottee No. 491, IA-488 (Aug. 25, 1955) 62 I. D. 337

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Generally--Continued

Under a statute providing that the names of certain classes of persons shall be placed on the tribal membership roll and providing further that only enrolled members shall be entitled to inherit, an apparent heir may be unenrolled at the date of his ancestor's death and yet be entitled to enrollment as a matter of right, thus becoming qualified to inherit.

A person disqualified by statute from inheriting in the estate of his ancestor shall be regarded as having predeceased the ancestor, and the inheritance shall be cast accordingly in the decedent's next of kin who are otherwise qualified.

Devolution of Yakima Indian Estates, M-36331 (Mar. 16, 1956)

When the Secretary of the Interior in the process of determining who shall inherit a restricted Indian estate makes findings regarding the marital status of the deceased Indian and of any person claiming as her surviving spouse, the Secretary is not bound by State law or State orders or decrees on the subject.

Estate of Jeanette Scott Edland, Unallotted Nez Perce Indian, IA-107 (May 17, 1956) 63 I. D. 141

An appeal to the Secretary of the Interior from the decision of an Examiner of Inheritance denying a petition for rehearing, under the regulations prescribing a time limit within which such appeals may be filed cannot receive consideration if the appeal was not filed within the time prescribed by the regulations or an extension thereof granted by the Secretary of the Interior.

Estate of Jack (Jacque) Naylor, Yakima Allottee No. 4523, IA-623 (Sept. 5, 1956)

The State courts of Oklahoma are without authority to administer on the restricted estates of deceased Indians of the Five Civilized Tribes, and such courts are likewise without authority to consider and allow claims against the distributive shares of Indian heirs which are restricted by the act of August 4, 1947 (61 Stat. 731).

Distribution of Restricted Indian Estate, M-36426 (Jan. 4, 1957) 64 I. D. 17

The property comprising the restricted estate of a Five Tribes Indian decedent continues restricted and subject to the jurisdiction of the Secretary of the Interior only so long as belonging to Indian heirs of one-half or more Indian blood computed from the final rolls of the Five Civilized Tribes pursuant to the act of August 4, 1947 (61 Stat. 731).

Jurisdiction Over Property Belonging to a Five Tribes Indian's Estate, M-36455 (July 12, 1957) 64 I. D. 280

As to members of the Yakima Tribes dying after the approval of the act of August 9, 1946, section 7 of that act applies to the devolution of that part of the decedent's trust or restricted estate which (1) came to the decedent through his membership in the tribes or (2) which consists of any interest in or the rents, issues, or profits from an allotment of land within the Yakima Reservation or within the area ceded by the treaty of June 9, 1855 (12 Stat. 951), irrespective of whether the allotment, or interest therein, was acquired by the decedent by allotment patent, inheritance, devise or restricted deed, but excepting decedent's restricted purchased lands which at any time prior to their acquisition by him may have been in an unrestricted status.

Scope of Section 7 of the Yakima Act of August 9, 1946 (60 Stat. 968; 25 U. S. C., 1952 ed., Sec. 607), M-36495 (Jan. 13, 1958)

In probating the restricted estate of a deceased Indian of the Crow Tribe of Indians of Montana, no person can be recognized as the adopted heir of such decedent under the act of March 3, 1931 (46 Stat. 1494), unless the adoption was approved in the manner provided by that act. The initiation of certain action to obtain the required approval of the Superintendent is ineffective where such approval was not given, and, therefore, a status as an adopted heir of the decedent is not achieved.

Estate of Walks With a Wolf, Deceased Crow Allottee No. 137, IA-254 (Feb. 21, 1958) 65 I. D. 92

Where the evidence upon which an Examiner of Inheritance determined the heirs of a deceased Indian is conflicting and it appears that essential

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Generally--Continued

testimony may be available which has not been obtained, the case will be remanded for a further hearing.

Estate of John Musmustoo, Deceased Yakima Allottee No. 3516, IA-712 (May 28, 1958) 65 I. D. 289

A claim for care of a deceased Indian will be disallowed where it has not been proved, and where such care apparently was given without expectation of compensation in a situation where the parties concerned maintained a family relationship with each other.

Estate of Julia Goodwin Little Horse, IA-853 (July 28, 1958)

A petition for reopening of a probate not filed within a period of 3 years from the date of a decision by an Examiner of Inheritance may be denied under regulations contained in 25 CFR 15.18.

Estate of Mary Moses, Colville Allottee No. S-33, IA-851 (Nov. 17, 1958)

When a deceased Yakima Indian of the blood of the fourteen original Yakima Tribes, parties to the treaty of June 9, 1855 (12 Stat. 951), had received an allotment on the public domain within the area ceded to the United States by the Yakima Tribes by the said treaty of 1855, and was living on the date of the act of August 9, 1946 (60 Stat. 968), but was not enrolled during his lifetime as a member of the Yakima Tribes the devolution of his estate is not affected by section 7 of the 1946 act.

When property is omitted from the inventory of an Indian estate, the decision relating to the estate shall be modified to include the omitted property, and when such property takes a different line of descent from that in the decision, a supplemental hearing to determine the heirs thereto is required (25 CFR 15.31).

When unusual Indian names are encountered the several names by which an individual may be known should appear in the record and the record should contain a consistent spelling of such names whenever possible. A record containing names that cannot be identified on review to establish relationships will be remanded.

When an order issued by an Examiner of Inheritance upon a petition for rehearing amends the original order, it is proper for the Examiner

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Generally--Continued

to entertain a petition for rehearing from parties aggrieved by the amending order.

Estate of Billie Peters (Haup), Spokane Homestead No. 018811 Yakima Unallotted, IA-847 (Mar. 10, 1959)

A petition for rehearing and appeal filed in the case of a deceased Indian which seeks to modify the inventory of the estate and to exclude property acquired by the decedent in probate proceedings completed 17 years earlier, is in effect an attempt to reopen the earlier proceedings, and will be denied when it is not timely filed under the regulations applicable to reopening the earlier proceedings.

Estate of Helen White Coat Elk Nation, IA-856 (Jun. 17, 1959)

A confession of error submitted by an Examiner of Inheritance for consideration in connection with an appeal from the Examiner's order will serve as justification for remanding the case to the Examiner for further action.

Estate of Ka-E-Pah, Navajo Allottee No. 1047, IA-1044 (Sept. 3, 1959) 66 I. D. 314

Claims against Estates

An appeal to consider a claim filed in a decedent's estate will be dismissed upon a request of the claimant and the submission of proof that a settlement of the claim has been effected.

Estate of Amos Shields, Deceased Crow Creek Allottee No. 611, IA-850 (Oct. 2, 1958)

A father being primarily responsible is expected, if able, to provide for the care and support of his minor child.

A claim for care made in a deceased's estate, to receive favorable consideration must show by clear and convincing proof that care was given on a promise of compensation and that compensation was expected. 25 CFR 15.23(d)

Estate of Frederick Kills First, Deceased, Cheyenne River Allottee No. 5128, IA-875 (Nov. 21, 1958)

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Claims Against Estates--Continued

By approving a claim against the estate of a deceased Indian a lien nevertheless cannot be impressed against the trust or restricted property included as a part of the estate, and where an attempt has been made to create such a lien in an order of an Examiner of Inheritance steps will be taken to expunge from the probate record the reference to a lien.

Validity of Unapproved Side Agreements Between Indians and Lessees of Restricted Lands, M-36549 (Feb. 3, 1959)

Claims for care presented in the probate of a deceased Indian's estate will not receive favorable consideration unless clear and convincing proof is offered showing that the care was given on a promise of compensation and that compensation was expected.

Objections to the allowance of a claim made by one who is not an heir and does not inherit from the estate will not be given consideration.

Estate of White Hawk, Cheyenne Allottee No. 2424, IA-942 (May 4, 1959)

A petition for rehearing filed with an Examiner of Inheritance may properly be denied where the petition was not filed within the period prescribed by the applicable regulations.

Estate of Henry Amauty, IA-879 (Jul. 17, 1959)

An appeal to the Secretary of the Interior from a decision by an Examiner of Inheritance denying a petition for rehearing to consider a claim against a deceased Indian's estate will not be entertained when such appeal was not filed within the time specified under the Departmental probate regulations.

Estate of Coffee No. 2, Rosebud Sioux Allottee No. 3646, IA-926 (Dec. 18, 1959)

Escheat

The next of kin of an Indian decedent, who is not an enrolled member of the Klamath Tribe with at least one-sixteenth degree of

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Escheat--Continued

Indian blood of the Klamath Tribe, may not inherit the decedent's restricted or trust property within the Klamath Reservation, but such property will escheat to the Tribe.

Estate of John Stevens or John Stephens, IA-1002 (Oct. 26, 1959) 66 I. D. 367

Intestate Succession

A petition for the reopening of an Indian heirship proceeding more than 25 years after the Department had determined the heirs of the Indian decedent, must be denied on the ground it was not submitted within the period of time prescribed in the departmental regulations.

Estates of Susan Wilson Marshall, Umpqua Allottee No. 11-S - And - Dummy, Coos Bay Allottee No. 131, IA-129 (Feb. 15, 1955)

Where the claim of a putative father to inherit from his illegitimate Indian son cannot be upheld under the laws of the State governing the devolution of the estate, the act of February 28, 1891 (25 Stat. 795, 25 U.S.C., 1952 ed., sec. 371), is of no assistance since it does not create any rights in the father to inherit from his illegitimate issue.

Estate of John Slickpoo, IA-130 (Feb. 28, 1955)

A claim against an Indian's estate which has not been proved, which is unsupported by any agreement between the parties indicating that compensation was promised or expected, and which was submitted merely as an afterthought following the Indian decedent's death, cannot be allowed.

In a case of disputed heirship to an Indian's estate, the finding of an Examiner of Inheritance, which is supported by the best available evidence, and which is in accord with the departmental probate records, will not be disturbed.

Estate of Joshua Comes Out, IA-209 (Mar. 10, 1955)

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Intestate Succession--Continued

A petition for the reopening of an Indian heirship proceeding more than thirty-nine years after the Department had determined the heirs of the Indian decedent, must be denied on the ground it was not submitted within the period of time prescribed in the Departmental probate regulations.

Estate of William Slow, Lower Yanktonai Sioux Allottee No. 831, IA-246 (April 4, 1955)

Under section 9 of the act of August 13, 1954 (68 Stat. 718), (1) all trust and restricted property of members of the Klamath Tribe who die 6 months or more after the date of the act is subject to the probate jurisdiction of State courts; (2) if the State court orders a sale of such property in order to pay claims and probate expenses, the purchaser whether Indian or non-Indian, takes a fee simple title to the property sold; (3) if the court distributes such property to an Indian heir, such heir acquires the property in a trust or restricted status unless such status has been removed by operation of said act; but if the distributee or devisee is a non-Indian, the trust and restricted status is removed; (4) if the court decides it would be advantageous to cause a trust or restricted allotment to be leased during the period of probate, it must be leased in accordance with Federal rules and regulations; (5) the court, in probating such property, may appoint guardians ad litem to protect the interests of minors, incompetents or persons non compos mentis; (6) where the court orders a sale of such trust or restricted property, the United States is a necessary party to the proceedings therefor, and must be served with the petition for sale and accorded an opportunity to be heard. Service should be made upon the U. S. Attorney and upon the Attorney General of the United States; (7) heirs or devisees of Klamath Indians need not be qualified by the 1/16th degree Indian blood of the Klamath Tribe as formerly required; (8) trust and restricted estates of Klamath Indians who died prior to February 13, 1955, will be probated by the Federal Examiner of Inheritance and not by a State court.

Klamath Terminal Legislation, M-36284 (May 20, 1955) 62 I. D. 186

A petition for the reopening of an Indian heirship proceeding more than 28 years after the Department has determined the heirs of the Indian decedent must be denied on the ground

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Intestate Succession--Continued

it was not submitted within the period of time prescribed in the departmental probate regulations.

Estate of Blue Bug, Fort Berthold Allottee No. 434, IA-174 (June 20, 1955)

A petition for the reopening of an Indian heirship proceeding more than 42 years after the Department had determined the heirs of the Indian decedent, must be denied on the ground it was not submitted within the period of time prescribed in the departmental probate regulations.

Estate of Smoky Jim, Burns Allottee No. 34, IA-148 (June 20, 1955)

Where the proof in an Indian probate proceeding indicates that there have been successive marriages and divorces by Indian custom between an Indian woman and her husbands, the record warrants a finding that the Indian decedent died unmarried and single and her heirs should be determined on that basis.

Estate of Jeanette Scott Edland, Unallotted Nez Perce Indian, IA-107 (May 17, 1956)
63 I. D. 141

The contention that the actions of a surviving spouse resulted in the death of his wife in an automobile accident and that he should be prohibited from sharing in her estate under the State statutes of descent held not to be proved and the surviving spouse is not barred from inheritance under the laws of the States of Washington and Oregon.

Estate of Adeline Stamill Goudy, Unallotted Yakima Indian, IA-517 (Feb. 11, 1957)

The doctrine of ancestral descent is not applicable to an adult Indian estate under Oregon statutory laws.

Estate of John Thomas, Deceased Cayuse Allottee No. 223 and Estate of Joseph Thomas, Deceased Umatilla Allottee No. 877, IA-848 (Nov. 6, 1957) 64 I. D. 401

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Intestate Succession--Continued

An order denying a petition for rehearing on the basis that a person other than the petitioner is the next of kin of an Indian decedent will be affirmed where the record in fact discloses that petitioner's degree of relationship to the decedent is more remote than the relationship to the decedent of the person found to be the heir at law.

Estate of Jenny (Clara) Burke Antelope, Yakima Allottee No. 1118, IA-841 (Nov. 27, 1957)

A decision disallowing a claim for care of a deceased Indian will not be disturbed on appeal where it is shown that the care was given without a promise or expectation of compensation.

Estate of Alice Full Stomach (Little Bridge) Lillibridge, IA-871 (Aug. 1, 1958)

Presumption of Death

To determine death to have occurred at an earlier date than 7 years, evidence must show facts or circumstances which would establish that it was at an earlier date. If a precise period as to time of death must be established, it must be done so by evidence of such character as to make it probable that he died at the particular time.

An Examiner of Inheritance may hear and determine the issue of whether an Indian, by reason of his unexplained absence, is to be presumed dead. (25 CFR 81.20.) At common law and under the statutes of Oregon, a person is presumed to be dead after an unexplained absence of 7 years.

Estate of John Thomas, Deceased Cayuse Allottee No. 223 and Estate of Joseph Thomas, Deceased Umatilla Allottee No. 877, IA-848 (Nov. 6, 1957) 64 I. D. 401

It is proper to approve the will of a deceased Osage Indian on the basis of supporting affidavits executed by the attesting witnesses, in the absence of convincing evidence refuting the affidavits.

Margaret Hayes Twomey, IA-158 (Mar. 22, 1955)

It is proper for an Examiner of Inheritance to approve a lost or misplaced will of an Indian testator when its execution was established by competent evidence and its provisions verified from the scrivener's notes.

The findings of an Examiner of Inheritance with respect to the testamentary capacity of an Indian testator will not be set aside when they are supported by evidence adduced at a probate hearing on the will.

Estate of Ute, Arapaho Allottee No. 1070, IA-143 (April 1, 1955)

Testimony essential to a proper determination of the question whether a deceased Indian was competent to make his will and whether he was subjected to undue influence should be obtained. This would include the testimony of two attesting witnesses to the will, one of whom was also the scrivener of that instrument.

Estate of Clemente Segundo, IA-136 (April 5, 1955)

Under section 9 of the act of August 13, 1954 (68 Stat. 718), (1) all trust and restricted property of members of the Klamath Tribe who die 6 months or more after the date of the act is subject to the probate jurisdiction of State courts; (2) if the State court orders a sale of such property in order to pay claims and probate expenses, the purchaser whether Indian or non-Indian, takes a fee simple title to the property sold; (3) if the court distributes such property to an Indian heir, such heir acquires the property in a trust or restricted status unless such status has been removed by operation of said act; but if the distributee or devisee is a non-Indian, the trust and restricted status is removed; (4) if the court decides it would be advantageous to cause a trust or restricted allotment to be leased during the period of probate, it must be leased in accordance with Federal rules and regulations; (5) the court, in probating such property, may appoint guardians ad litem to protect the interests of minors, incompetents or persons non compos mentis; (6) where the court orders a sale of such trust or

restricted property, the United States is a necessary party to the proceedings therefor, and must be served with the petition for sale and accorded an opportunity to be heard. Service should be made upon the U. S. Attorney and upon the Attorney General of the United States; (7) heirs or devisees of Klamath Indians need not be qualified by the 1/16th degree Indian blood of the Klamath Tribe as formerly required; (8) trust and restricted estates of Klamath Indians who died prior to February 13, 1955, will be probated by the Federal Examiner of Inheritance and not by a State court.

Klamath Terminal Legislation, M-36284 (May 20, 1955) 62 I. D. 186

Where the testamentary capacity of the testatrix is attacked, and the evidence concerning her competency is conflicting, and her competency is supported by the testimony of the scrivener and the two witnesses to the will and the fact that the terms of the will were not unnatural, no sufficient basis exists for disapproval by the Secretary of the Interior in the exercise of his administrative discretion under applicable statutes.

Wesley Bearskin, IA-147 (June 6, 1955) 62 I. D. 222

An appeal from a decision by an Examiner of Inheritance denying petitions for rehearing must be filed by a person aggrieved by the Examiner's decision, or by such person's attorney or representative, and where copies of an appeal were not furnished to the adverse parties as required by the probate regulations, the appeal will be dismissed.

Estate of Charles O'Brien, Unallotted Kikialus Indian, IA-142 (June 20, 1955)

The findings of an Examiner of Inheritance with respect to undue influence being exerted upon a testator in the procurement of the execution of his last will and testament, will not be set aside on appeal when they are supported by the weight of the evidence adduced in a proper and adequate probate proceeding.

Estate of Richard Wolf, Deceased Fort Berthold Allottee No. 2224, IA-490 (Sept. 6, 1955)

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Wills--Continued

The findings of an Examiner of Inheritance that a testatrix had physically destroyed her will, in the manner provided for in the probate regulations, will not be set aside on appeal when they are supported by the evidence adduced at a probate hearing and the records of an Indian agency.

Estate of Tenechespum Whiz, Yakima Allottee No. 2621, IA-503 (Feb. 13, 1956)

An Examiner's decision that undue influence was practiced on a testatrix will not be disturbed on appeal if that decision is supported by credible evidence adduced at a probate hearing where all interested parties were given full opportunity to testify and present evidence in support of their contentions.

Estate of Annie Grace, IA-144 (Feb. 21, 1956)
63 I. D. 68

A request for review of the action of an Examiner of Inheritance in approving the will of a deceased Indian will be denied in the absence of a tender of proof of matters germane to the issue.

Estate of Jeanette Ezekial, Deceased Nez Perce Allottee No. 1432, IA-643 (May 17, 1956)

An intention to revoke a will accompanied by the necessary physical destruction of the instrument at the direction of the testator effectively revoked the instrument.

Estate of Angelo Jefferson, Deceased Lummi Allottee No. 13-B, IA-817 (July 16, 1956)

The restricted headright of a qualified Osage Indian may be disposed of under a will approved by the Secretary of the Interior or his authorized representative. Held, that the approved last will and testament of the Osage Indian decedent, revoking all prior wills, complied with legal requirements, and a disposition by the decedent of his estate under the will to his widow in preference to surviving issue was natural and not inequitable, unfair or unjust in the circumstances.

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION --Continued

Wills--Continued

A will executed pursuant to a contract to make a will is revocable and is not entitled to probate if a revoking will is executed.

Bismark Mosier, IA-150 (July 20, 1956)
63 I. D. 205

The findings of an Examiner of Inheritance with respect to the testamentary capacity of an Indian testator will not be set aside when they are supported by competent evidence adduced at a probate hearing on the will.

Estate of Frank C. Goings, Pine Ridge Allottee No. 2591, IA-492 (July 23, 1956)

Before taking action on the will of a deceased Indian proof must be submitted as to the testamentary capacity of the decedent to execute the will and the circumstances surrounding its execution. Held, that the proof submitted at the probate hearing coupled with affidavits accompanying a petition for rehearing justify the remanding of the proceedings for a rehearing by the Examiner of Inheritance concerning the testamentary capacity of the decedent to execute the will.

Estate of Annie Seth Corbett Miller, IA-748 (Aug. 13, 1956)

Where a probate record on the contest of an Indian decedent's will was incomplete because essential information from persons attending the execution of the will had not been obtained, and where upon rehearing it is established by the attesting witnesses, including the scrivener of the will, and by other proof that the decedent was competent to make his will and that he was not subjected to undue influence, the will is an instrument which should be approved.

Estate of Clemente Segundo, IA-136 (Supp.) (Aug. 24, 1956)

The will of a deceased Indian of the Five Civilized Tribes which was acknowledged and approved as required by section 23 of the act of April 26, 1906 (34 Stat. 137), as amended, can effectively devise restricted lands without regard to any limiting provisions of the Oklahoma law, but such will cannot effectively disinherit a surviving spouse with respect to other types and classes of property.

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Wills--Continued

The Oklahoma law of wills applies in the case of restricted estates of deceased Indians of the Five Civilized Tribes in all particulars save as modified by the proviso contained in section 23 of the act of April 26, 1906 (34 Stat. 137), as amended.

Distribution of Restricted Indian Estate, M-36426 (Jan. 4, 1957) 64 I. D. 17

The authority of the Secretary of the Interior to approve an Indian's testamentary disposition of restricted property under 25 U.S.C. sec. 373 is not limited by the law of the State or by an agreement for the division of the estate which is entered into by persons claiming an interest therein.

In making a per capita distribution of tribal funds under the act of August 9, 1955 (69 Stat. 559), which calls for distribution to the "heirs or devisees" of deceased members of the tribe, it is proper to distribute the funds to a general residuary legatee. (Solicitor's opinion of May 2, 1944, 58 I. D. 680, distinguished.)

Estate of Minnie Mehojah Rowe, Kaw Allottee No. 77, IA-852 (May 21, 1957) 64 I. D. 141

An appeal from a decision of an Examiner of Inheritance which denied a petition for rehearing, after a determination of heirs and approval of a will, may be withdrawn by the appellants in aid of a settlement whereby distribution of the estate is to be made in a manner other than by the terms of the will.

Estate of Bernard Whatkan, Coeur D'Alene Allottee No. 415, IA-796 (July 31, 1957) 64 I. D. 302

A notice of appeal from the action taken by an Examiner of Inheritance on a petition for rehearing must be filed within 60 days after the date on which notice of the Examiner's action is mailed to the interested parties (or within such additional period as the Secretary, for good cause, may allow in any case). 25 CFR 81.19.

Estate of Willie David, Klamath Allottee No. 1380, IA-876 (Nov. 7, 1957)

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Wills--Continued

Unequal distribution by will to the natural objects of testator's bounty does not constitute an inequitable or unnatural will.

Sickness or bodily weakness alone does not disqualify one from making a will.

To invalidate a will for lack of testamentary capacity, evidence must show condition to exist at the time of the execution of the will.

To invalidate a will for lack of testamentary capacity, evidence must show condition to exist at the time of the execution of the will.

Estate of Martha DeRoin, Osage Allottee No. 417, IA-874 (Nov. 27, 1957)

Notwithstanding certain irregularities incident to the witnessing of an Indian decedent's will, additional proceedings are required where the record contains other proof tending to attest to the validity of the will and indicating that a petition for rehearing from an order of an Examiner of Inheritance disapproving the will should have been served upon the adverse parties for answer and possibly a further hearing before action was taken on the petition for rehearing.

Estate of Ortego Lopez, IA-860 (Apr. 4, 1958)

The disapproval of a will of an Osage Indian by the authorized representative of the Secretary of the Interior results in a disapproval of the entire instrument, including the revocation clause contained in the will, where the reasons for such disapproval extend to the entire instrument.

Where a testator by will revokes a prior will but had included in both instruments similar devises, and there is no reason to suppose that he would have made the change if he had been aware that the change would have been wholly futile, the doctrine of dependent relative revocation should be applied and the revocation clause in testator's later will should be held to be ineffectual to cancel the prior will or to destroy testator's intention to die testate.

Where the testamentary capacity of the testator is attacked, or undue influence is charged, and the protestants to an earlier will fail to offer evidence in support of their contentions, and where the Field Solicitor who conducted the

will hearing advises that the will was prepared and executed in accordance with the laws of Oklahoma, and that its terms were not unnatural, such instrument will be approved by the Secretary of the Interior in the exercise of his administrative discretion under the applicable statutes.

In the Matter of the Will of Kenneth Strikeaxe, Deceased Unallotted Osage Indian, IA-248 (Apr. 21, 1958) 65 I. D. 157

Where the consideration of an appeal from an Examiner's decision has been suspended at the appellant's request in aid of a contemplated settlement, the appeal will be dismissed upon the request of the interested parties and the submission of proof that the settlement has been effected.

Estate of Bernard Whatkan, Coeur D'Alene Allottee No. 415, IA-796 (June 20, 1958)

A primary purpose of the execution of a will is to alter the normal course of descent, and in a situation where opportunity was afforded interested parties to present proof the findings of an Examiner of Inheritance with respect to the validity of an Indian's will including the approval thereof will not be set aside when supported by competent evidence adduced at the probate hearing on the will and in the absence of impelling proof to the contrary.

Estate of Pinnahge Pimmee Pokibro, IA-861 (June 30, 1958)

It is incumbent upon an Examiner of Inheritance to make a reasonable effort to procure the testimony of the attesting witnesses to an Indian will; or if their testimony is not reasonably available, an effort shall be made to identify their signatures through other evidence.

Estate of Isabel Finley Granjo, Flathead Allottee No. 2360, IA-768 (Aug. 20, 1958)

The limitation imposed by statute upon the qualification of heirs of a decedent of one-half or more Osage Indian blood, is not applicable to the devisees under a will of an Osage Indian.

Only such person as shall take under the will or a presumptive heir of the decedent under the succession laws of the State of Oklahoma, has such an interest as will permit him to contest the will of an Osage Indian.

A presumptive heir of an Osage Indian, whose relationship to the decedent is too far removed to participate in the estate, has no right to contest the will of such decedent.

While an adjudication of a testator's mental incapacity to manage his property is to be considered in the determination of his testamentary capacity, such evidence is not conclusive proof thereof.

The proponent of an Osage Indian will is not required to offer further evidence after having presented prima facie proof.

A will devising most of her estate to her church by an elderly woman, whose nearest relative is a cousin, is not an unnatural will.

Estate of Mae F. Lassley, Osage Allottee No. 634, IA-882 (Sept. 29, 1958) 65 I. D. 421

An adjudication of a testator's mental incompetency to manage his property is to be considered in the determination of his testamentary capacity, but such evidence is not conclusive proof thereof.

An anticipated refund of taxes paid from the individual account of an Indian, when received, will be included in the estate as omitted property in accordance with 25 CFR 15.31 and the original order of distribution need not be stayed, reconsidered or amended pending the receipt of such a refund.

Funds paid to an Indian from his individual money account, upon payment, become nontrust property no longer subject to the jurisdiction of the Department of the Interior. The Examiner of Inheritance has no jurisdiction to determine the use of such funds or to order an accounting of the disposition of the funds paid to the Indian from his individual account.

Testamentary capacity is a state of mental capacity of the business then ensuing, to be able to bear in mind in a general way the nature and situation of the property, to remember the objects of the testator's bounty, and to plan or understand the scheme of distribution.

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Wills--Continued

The previous wills of a testator need not be considered when his last will revokes all former wills and no proof is offered to show that the last will was invalid.

The testimony of an attesting witness to a will, who tries to impeach the mental capacity of the testator and the due execution of the will is entitled to little credence and should be viewed with suspicion and caution.

Estate of Wook-Kah-Nah, Comanche Allottee No. 1927, IA-855 (Oct. 21, 1958)
65 I. D.436

An appeal to the Secretary of the Interior from a decision by an Examiner of Inheritance denying a petition for rehearing on a deceased Indian's estate will not be favorably considered where such appeal was not filed within the time prescribed by the Departmental probate regulations, and the estate has been distributed.

Estate of Julia Long Cat Big Charger Ghost Bear, Pine Ridge Sioux Allottee No. 6881, IA-867 (Nov. 14, 1958)

An Indian testator, when disposing of trust or restricted property by his will, is not required by the regulations of the Secretary of the Interior to name or provide for a child or children so as to avoid intestacy as to pretermitted children under the laws of a state.

Limitations prescribed by State law are not applicable to wills made by Indians in disposing of trust or restricted property, unless adopted in the regulations promulgated by the Secretary of the Interior respecting Indian wills.

The right of Indians to dispose of restricted property by will without regard to limitations imposed by State law is not modified or affected by section 4 of the Indian Reorganization Act.

Estate of Harry Shale, Quinaielt No. 408, IA-880 (Nov. 21, 1958)

Although an Osage Indian will is in strict accordance with the laws of the State of Oklahoma, before it can be held valid, it must be approved by the Secretary of the Interior.

A will executed by a chronic alcoholic giving his entire estate (except $10.00) to his bootlegger friend and confidant, thereby depriving his minor daughter of needed funds for her support, is an inequitable and unnatural will.

The authority of the Secretary of the Interior to approve or disapprove a will of an Osage Indian, as provided in Section 8 of the Act of April 18, 1912 (37 Stat. 86), is discretionary, going beyond the factum of the will and including an investigation of the considerations which may have induced the testator in any particular case to disinherit his heirs.

When an Indian decedent had provided an allotment for his daughter while in the Army, had written letters to her as a father, had recognized her as his daughter over a period of years, and when the daughter, being born in wedlock, was named as his daughter in a divorce decree, and also named as his daughter in his will, the daughter will be presumed to be his legitimate child regardless of any doubts he may have professed to the contrary.

When circumstances of inequality or unfairness in a will are coupled with a confidential relationship existing between a testator and a favored beneficiary named in the will, as a result of which relationship the beneficiary has dominated and controlled the testator for some time, there is a presumption of undue influence, placing the burden upon the proponent of the will of producing evidence to show that the will represented the uncontrolled act of the testator.

Estate of Leo B. Mayse, Unallotted Osage Indian, IA-838 (Dec. 5, 1958)

While it is incumbent upon the Secretary of the Interior to consider the laws of Oklahoma when approving the will of an Osage Indian, if it appears that pertinent questions pertaining to those laws have not been definitely determined by the Oklahoma Courts, it is proper for the Secretary to avoid making his own interpretation of such laws but to proceed to approve the will.

The right of a surviving spouse to inherit from the deceased spouse's estate when their marriage was entered into within six months after procuring a divorce and the decedent died within the six-month period, is a question that has not been determined by the Oklahoma Courts with such finality as to guide the Secretary of the Interior in his approval or disapproval of an Osage will.

Facts pertaining to the right to inherit are not properly presented in a contest of the will as these are facts pertaining to inheritance and are before the court only at the time of the distribution of the estate, but if the contestant's own admissions show conclusively that she can in no event have any interest in the estate the court may refuse to hear contestant and dismiss her protest.

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Wills--Continued

The right ordinarily given a surviving spouse to administer the estate in the event of intestacy and to contest a will of itself is not such an interest in the estate as to entitle such spouse to contest the will in all instances.

The only persons who can contest the probate of a will are those persons having an interest in the estate of the decedent.

A person not of Indian blood cannot inherit from those who are of one-half or more Indian blood of the Osage tribe of Indians any right, title or interest to any restricted lands, money or mineral interests of the Osage Tribe.

Estate of Jesse Earl Jones, Unallotted Osage Indian, IA-881 (Jan. 5, 1959)

To have testamentary capacity, a testator must know the natural objects of his bounty.

A supplemental hearing found necessary to secure material evidence may be conducted only after notice has been given to those persons on whom notice of the original hearing was served and to such other persons as the testimony taken at the original hearing indicates may have a possible interest in the estate.

In the absence of clear and conclusive evidence, all available witnesses should be called to give testimony under oath, with an opportunity of any interested party to cross-examine.

It is incumbent upon an Examiner of Inheritance to take testimony relating to the testamentary capacity of the decedent to execute a will, and as to the circumstances surrounding its execution.

While affidavits not included in the original record cannot be considered as evidence upon review on appeal, they may be given consideration in aid of an appeal to describe available evidence not presented at the original hearing.

Estate of Charlotte Davis Kanine, Nez Perce Allottee No. 434, IA-828 (Jan. 8, 1959)

An appeal by parties claiming an interest in an estate will be dismissed upon a request of the appellants and the submission of proof that a settlement between all of the parties has been effected.

Estate of Osotewin (Smokey Woman, or Mrs. White Tallow), Deceased Yankton Sioux Allottee No. 127, IA-845 (Jan. 16, 1959)

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Wills--Continued

Evidence available at the time of a hearing will not be considered as newly discovered evidence.

A tender of evidence serving only to impeach a witness who has testified to the competency of testatrix at the time of the making of her will, when there remains other credible testimony in support of her competency, does not constitute persuasive justification for granting a rehearing.

Estate of Lean Woman (Sankey), Arapaho Allottee No. 1487, IA-886 (Jun. 24, 1959)

A primary purpose of a will is to alter the normal course of descent of the property of a testatrix in the manner of her choice.

While the naming of relatives by a testatrix in her will, if only by way of reference, will show that the testatrix had the objects of her bounty in mind, nevertheless other available evidence showing that testatrix had knowledge of the objects of her bounty also is sufficient to support the will.

Estate of Kaun-dy (Joanna), Deceased Kiowa Allottee No. 1721, IA-1008 (Nov. 23, 1959)

A presumptive heir who did not receive the notice of hearing required by 25 CFR 15.4 is entitled to a new hearing in special circumstances where none of the presumptive heirs was present at the original hearing and the record fails to disclose a definite attempt to locate them for notification.

Estate of Alphonse Guie, also known as Gwen or Gua, IA-1030 (Dec. 2, 1959)

The findings of an Examiner of Inheritance with respect to the validity of an Indian's testamentary disposition will not be disturbed when they are supported by competent evidence.

Estate of Mary Taylor Ward, IA-1018 (Dec. 7, 1959)

A close confidential relationship existing between a major beneficiary of a will and the testator may give rise to a presumption of un-

INDIAN LANDS--Continued

DESCENT AND DISTRIBUTION--Continued

Wills--Continued

due influence, but in any event only slight evidence is required to establish undue influence when such close relationship is shown.

A will may be approved in part and disapproved in part where the undue influence is apparent only with respect to a portion of the will, and such portion is clearly separable from the rest of the instrument which is unaffected by the undue influence.

Estate of Milton Holloway, Deceased Osage Allottee, IA-742 (Dec. 8, 1959) 66 I. D. 411

A letter written and dated entirely in the handwriting of decedent and informing the recipient that she is to be the sole beneficiary of the writer's estate is a valid holographic will under the laws of Oklahoma. Where the intent to make a testamentary disposition of property is clear and specific it is immaterial that matters of a casual or extraneous nature also are included in the letter.

Estate of James H. Montgomery, IA-938 (Dec. 11, 1959)

The failure by the testatrix to request an attesting witness to subscribe her name as such, will not in and of itself cause the invalidity of the will of an Indian disposing of her trust or restricted property. The regulations (25 CFR 15.28(a), formerly 81.28(a)) require only that two adult disinterested persons shall act as attesting witnesses.

State laws have no application in determining the validity of wills of Indians disposing of their trust or restricted property.

Estate of Annie Devereaux Howard, Blackfeet Allottee No. 2105, IA-884 (Dec. 17, 1959)

INDIVIDUAL RIGHTS IN TRIBAL PROPERTY

Annuity and Per Capita Payments

When pursuant to section 5(a)(3) of the act of August 13, 1954 (68 Stat. 718), the selection is made of all that property of the Klamath Tribe which is to be sold to pay off withdrawing members, a partition of the tribal property results. Thereafter withdrawing members will be entitled to receive all the income from the

INDIAN LANDS--Continued

INDIVIDUAL RIGHTS IN TRIBAL PROPERTY--Continued

Annuity and Per Capita Payments--Continued

property so selected, but will not receive per capita payments from the remaining tribal property.

Under section 16 of the act of August 13, 1954 (68 Stat. 718), per capita payments may be made from the capital reserve fund of the Klamath Tribe established by 50 Stat. 872.

Klamath Terminal Legislation, M-36284 (May 20, 1955) 62 I. D. 186

The requirement of the act of June 15, 1934 (48 Stat. 964), that a member of the Menominee Tribe be living on the last day of the fiscal year in order that his estate share in a per capita payment out of stumpage earned during that fiscal year, has been repealed by section 3 of the act of June 17, 1954 (68 Stat. 250), with respect to per capitas payable from stumpage earned during a fiscal year ending on a date subsequent to June 17, 1954, since the 1954 act vested in each member on the final roll an individual, undivided share in the property of the Tribe.

Menominee Per Capita Payments, M-36288 (June 23, 1955)

A power of attorney given by an Indian with respect to the disbursement of annuity payments due him as a member of the tribe is revocable at the will of the Indian maker irrespective of the fact that the power contains an express provision against revocation.

Revocability of Authorities Given by Menominee Indian to the Superintendent of an Indian Agency With Respect to the Disbursement of Per Capita Distribution of Tribal Funds, M-36372 (Sept. 11, 1956)

In making a per capita distribution of tribal funds under the act of August 9, 1955 (69 Stat. 559), which calls for distribution to the "heirs or devisees" of deceased members of the tribe, it is proper to distribute the funds to a general residuary legatee. (Solicitor's opinion of May 2, 1944, 58 I. D. 680, distinguished.)

Estate of Minnie Mehojah Rowe, Kaw Allottee No. 77, IA-852 (May 21, 1957) 64 I. D. 141

INDIAN LANDS--Continued

INDIVIDUAL RIGHTS IN TRIBAL PROPERTY --Continued

Osage Headrights

A contract by an Osage Indian to make a will disposing of his Osage Indian headright is invalid because an interest in such headright owned by a person of Indian blood cannot be alienated.

Bismark Mosier, IA-150 (July 20, 1956) 63 I. D. 205

IRRIGATION

(1) Sales of trusteed allotted Indian lands on Wind River Indian Reservation made prior to February 14, 1920, are free of construction charges for irrigation ditches existing at time of sale, in absence of specific agreement to the contrary; such sales made subsequently are subject to these charges, in absence of specific agreement to the contrary.

(2) Sales of fee patented allotted Indian lands on Wind River Indian Reservation made prior to February 14, 1920, are free of construction charges for irrigation ditches existing at time of sale, in absence of specific agreement to the contrary; as to such sales made subsequently, liability for these charges depends upon whether or not the purchaser assumed it.

(3) In any event, in the case of both trusteed and fee patented allotted Indian lands, the lien imposed by the Act of March 7, 1928, for construction, operation and maintenance charges runs with the land.

Collection of Accrued and Unpaid Construction Charges Against Non-Indian Lands of the Wind River Indian Irrigation Project, Wyoming, M-36479 (Nov. 26, 1958)

LEASES AND PERMITS

Generally

The act of August 9, 1955 (69 Stat. 540), applies generally to the leasing of restricted Indian lands wherever situated, including reservations such as the Crow Reservation, where special leasing statutes had theretofore been enacted, thus supplying additional leasing authority without displacing or superseding the special statutes.

INDIAN LANDS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

Application of the General Leasing Act of August 9, 1955 (69 Stat. 540), to the Crow Indian Reservation, Montana, M-36318 (Dec. 15, 1955) 62 I. D. 469

Mining or gas and oil leases are not authorized by the act of August 14, 1955 (69 Stat. 725), which provides for the Secretary of the Interior to grant leases on the Colorado River Reservation for "public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases * * *."

Mining Leases on Unassigned Lands Located on the Colorado River Reservation, M-36327 (Jan. 19, 1956)

The Secretary of the Interior has authority to make a notation in a patent for tribal or allotted Indian land concerning the encumbrance thereon and such a notation is administratively desirable.

Effect of Terminal Legislation Upon Revocable Rights-of-Way and Other Real Property Encumbrances on Indian Lands, M-36369 (Sept. 17, 1956)

Lease of tribal lands by a tribe with Secretarial approval made pursuant to the Leasing Act of August 9, 1955 (69 Stat. 539), will not be impaired by a future allotment of the land to an individual Indian, which will be taken by the allottee subject to such lease. A lease thus authorized by law is not an encumbrance on allotted land forbidden by section 5 of the Mission Indian Act of January 12, 1891 (26 Stat. 712).

Tribal Lease of the Hot Springs Administrative Reserve of the Agua Caliente Indian Reservation, California, M-36509 (May 22, 1958)

No rights accrue to a proposed lessee or holder of trust or restricted Indian lands in the absence of approval required by a statute or regulations based on such statute, and the Federal Government has the power to maintain an action opposing the use of restricted lands held under unauthorized lease.

INDIAN LANDS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

Agreements by Indian lessors and their lessees, made independently of approved leasing arrangements of trust or restricted Indian lands and purporting either to assure the lessees' tenure beyond the term of approved leases or to require the payment by the Indian lessors for any improvements by the lessees, are inoperative as affecting the trust or restricted property of the Indians for leasing purposes or otherwise without approval as required by law.

Validity of Unapproved Side Agreements Between Indians and Lessees of Restricted Lands, M-36549 (Feb. 3, 1959)

The general long-term leasing act (25 U. S. C., sec. 415), which authorizes the leasing of tribal lands by the Indian owners, is inapplicable to the unassigned lands of the Colorado River Indian Reservation until the beneficial ownership in such lands has been determined.

Authority to Lease Unassigned Lands of the Colorado River Indian Reservation, M-36557 (Feb. 24, 1959) 66 I. D. 57

A provision in the regulations giving the Superintendent authority to execute leases on behalf of Indians "who are non-residents and whose whereabouts are unknown to him" carries with it an implied obligation to make reasonable and diligent efforts to locate such persons and it is a question of fact as to whether such efforts were made.

Appeal of Orie E. Dosdall, IA-1043 (Sept. 22, 1959)

Grazing

The right of members of the Klamath Tribe to free-use grazing on tribal land will not terminate upon publication, under the act of August 13, 1954 (68 Stat. 718), of the final membership roll. The right to so use tribal land will continue until tribal title is extinguished by sale, or by transfer pursuant to section 6(a) of that act, in which latter event the use of the range will be governed by the terms of the plan pursuant to which such transfer is made.

Klamath Terminal Legislation, M-36284 (May 20, 1955) 62 I. D. 186

INDIAN LANDS--Continued

LEASES AND PERMITS--Continued

Grazing--Continued

Even if applicable to Indian lands, the provisions of the Soldiers' and Sailors' Civil Relief Act, which protect the rights of persons in the military service from forfeiture or prejudice, would not apply to action taken under a permit on Indian lands to reduce the area of the permit where the permit expressly provides for such a reduction at any time in the discretion of the Commissioner of Indian Affairs since such action does not result from any failure by the permittee to do any act that he might have done if he had not been in the military service.

The act of October 17, 1940 (54 Stat. 1187, 50 U.S.C. App. sec. 561), commonly known as the Soldiers' and Sailors' Civil Relief Act, has no application to leases or permits on Indian lands.

Applicability of Soldiers' and Sailors' Civil Relief Act to Grazing Leases and Permits on Indian Lands, M-36335 (Mar. 15, 1956)

Where a privilege is extended in connection with the advertisement of Indian lands for grazing purposes for an existing permittee to meet the high bid, the exercise of that privilege in the manner required will enable the existing permittee to obtain a new grazing permit on the lands included in the expiring permit.

Where pursuant to authority granted by the departmental regulations, and for purposes of conservation and the effective utilization of grazing resources, a division of the range area is made into range units regarded as suitable by field officials of the Bureau of Indian Affairs, such action will not be disturbed in the absence of a showing that the division of the range was improper.

F. C. Gifford, IA-797 (June 15, 1956)

Allocation of grazing privileges to Indian families will be made when it is clearly shown that the livestock to be grazed is owned by an Indian, and an allocation of grazing privileges will not continue as such when it is found that the permittee is no longer eligible.

The Superintendent may withdraw from advertisement and competitive bidding a grazing unit for the purpose of allocating it to an Indian who is qualified, which includes the requirement that he be the bona fide owner of livestock.

Mildred Maguire, IA-872 (May 22, 1958)

INDIAN LANDS--Continued

LEASES AND PERMITS--Continued

Grazing--Continued

A refusal to give written consent for the permitting of lands within a range unit, by the owner, does not remove those lands from the established range unit, even though such lands are located on the boundary of the unit and are not wholly surrounded by the permitted lands of the unit.

Restricted grazing lands within range units established under 25 CFR 151 may not be leased or permitted for farming or farm-pasture purposes under 25 CFR 131.

The established policy of the Department requires that every reasonable effort shall be made to obtain the written consent of the owner of restricted lands within an established range unit, for the permitting of such land when not in use by the owner.

The establishment of grazing range units is authorized by regulations promulgated by the Secretary of the Interior (25 CFR 151.6), to be effected under the direction of the Superintendent and the Area Director, after consultation with the Indians, in accordance with the requirements of range management, land status and Indian needs.

Ruby Rogers Connery, IA-978 (Oct. 31, 1958)

Authorized representatives of the Tribe shall determine for tribal land and recommend for allotted land the conditions under which grazing privileges shall be granted, including the privilege of existing permittees to meet the high bid thereon.

For an existing permittee to be given the privilege of meeting the high bid on a grazing unit, he must qualify in that respect and must in addition meet the stipulated requirements contained in the advertisement for bids.

The establishment and permitting of grazing units from restricted tribal and allotted Indian lands does not come under the purview of the Administrative Procedure Act.

A. J. Barta, John E. Barta and Charles K. Failing, IA-977 (Nov. 24, 1958)

A petition of landowners in a grazing range unit, expressing their desires to award the unit to one who has paid the tribal taxes, and not to the existing permittees who are in default on such taxes, is of no effect since said petitioners are not the General Council of the Tribe or their duly authorized representatives.

INDIAN LANDS--Continued

LEASES AND PERMITS--Continued

Grazing--Continued

Authorized representatives of the Tribe shall determine for tribal land and recommend for allotted land the conditions under which grazing privileges shall be granted, including the privilege of existing permittees to meet the high bid thereon.

A tribal resolution denying the privilege of an existing permittee to meet a high bid for a range unit, does not bar the existing permittee from entering a bid.

Bush Lockhart, IA-985 (Nov. 24, 1958)

When an appellant has met all necessary requirements to continue his grazing permit and the relative questions involved in his appeal have become moot, the appeal record will be closed.

L. D. Putnam, IA-1047 (Jul. 6, 1959)

When a superintendent notifies a bidder for a grazing unit that his bid has been accepted and that a permit will be issued to him, the notification does not give rise to a contractual right to have the permit issued, since the superintendent's action is subject to a right of appeal to higher authorities in the Department. Thus, after a rejection of bids, including a bid which was the basis of an award, upon readvertisement of the unit for grazing privileges and the receipt of a higher bid an award properly can be made of the unit to such higher bidder.

Don Faulk, IA-1050 (Aug. 24, 1959)

Minerals

A lease for the mining of diatomaceous earth on tribal lands of the Klamath Reservation in Oregon may be made for a period extending beyond the date fixed by Congress for the termination of Federal supervision and control only where it is clear that such a lease will not prevent or delay the termination of Federal trustee responsibilities.

Although the approval of the Management Specialists retained under the Klamath Termination Act of such a lease /see title/ is not essential to its validity, the manifold duties imposed upon them by the act require that they be

LEASES AND PERMITS--Continued

Minerals--Continued

consulted, and that their advice be obtained before any such lease is executed or approved.

Lease of Klamath Tribal Land Which Extends Beyond the Date Fixed by Congress for the Termination of Federal Supervision and Control, M-36307 (Nov. 17, 1955)

The acts of May 29, 1924 (43 Stat. 244; 25 U.S.C. sec. 398), and of March 3, 1927 (44 Stat. 1347; 25 U.S.C. sec. 398c), subject royalties from all mineral leases on unallotted lands to State production taxes.

State Production Taxes on Tribal Royalties From Leases Other Than Oil and Gas, M-36345 (May 4, 1956)

Failure on the part of the lessee of a mining lease of Indian lands to exercise diligence in the conduct of the prospecting and mining operations, or failure to act in good faith to develop the land for mining the minerals specified will give cause for the cancellation of the lease.

Uranium Exploration Company of California, IA-913 (Aug. 26, 1958) 65 I. D. 365

Oil and Gas

Requirement in a notice of public sale for oil and gas mining leases on Indian lands that sealed bids be submitted by a definite time must be observed and where a bid covering eight tracts was submitted after other timely bids on two of the tracts had been opened and the sale closed the late bid for the two tracts cannot be considered. Only the timely bids are acceptable under the public sale or steps may be taken in accordance with other provisions of the sale to reject all bids for the two tracts and readvertise those tracts at another public sale. Bids received late for the public sale on six tracts regarding which no competing bids had been received may be regarded as offers to purchase at a private or negotiated sale.

Plymouth Oil Company, IA-453 (July 15, 1955) 62 I. D. 262

LEASES AND PERMITS--Continued

Oil and Gas--Continued

A provision in a tribal constitution granting a preference right to acquire leases on tribal lands upon the payment of reasonable fees for the use of the lands cannot properly be construed to extend to oil leases where the constitution contains a separate provision covering the disposition of oil leases without any provision for a noncompetitive preference right.

Preference Right to Oil and Gas Leases on the Blackfeet Reservation, M-36306 (Sept. 29, 1955)

The rental and royalty provisions in oil and gas lease Form 5-157 (November, 1947) for tribal Indian lands are construed as "obligations," as well as "terms and conditions" and the lessee who fails to surrender the lease on or before the rental anniversary date becomes contractually obligated to pay the full amount of the annual rental. Failure to pay the rent and royalties on the due dates, or a late payment of either, would not result in automatic termination of the lease but would subject the lease to cancellation in the discretion of the Secretary of the Interior and the Tribal Council under section 6 of the lease form.

Interpretation of Rental Provisions in Oil and Gas Lease Form 5-157 (November, 1947) for Tribal Indian Lands, M-36348 (June 6, 1956)

The language of the act of March 3, 1921, 41 Stat. 1249, providing that all valid existing oil and gas leases on the seventh day of April, 1931, are hereby renewed upon the same terms and extended until the eighth day of April, 1946, and as long thereafter as oil or gas is found in paying quantities, extended the leases for the period during which oil and gas are reserved to the Osage Tribe and for a period so long thereafter as oil or gas is found in paying quantities.

The acts of March 2, 1929, 45 Stat. 1478, and June 24, 1938, 52 Stat. 1034, both contain language providing that any valid existing leases for oil or gas shall continue as long as gas or oil is found in paying quantities.

The term of oil and gas leases executed subsequent to the last extension act of June 24, 1938, 52 Stat. 1034, is fixed by the terms of the lease contracts themselves as provided for by the broad authority conferred upon the Osage Tribe and the Secretary of the Interior under the Allotment Act of June 28, 1906, 34 Stat. 539, as amended.

INDIAN LANDS--Continued

LEASES AND PERMITS--Continued

Oil and Gas--Continued

In the event the present period during which the oil, gas, and other minerals are reserved to the Osage Tribe should expire and the oil, gas, and mineral title is individualized, the transfer of such title will be subject to any valid subsisting oil or gas lease.

Status of Osage Oil and Gas Leases After Termination of Period During Which Oil, Gas, and Other Minerals are Reserved to the Osage Tribe, M-36381 (Nov. 9, 1956) 63 I. D. 374

Neither the payment of advance rentals nor their receipt by departmental officials upon a lease which had terminated can continue or reinstate the lease.

Where an Indian tribal oil and gas lease provides for a term of ten years and as much longer thereafter as oil and/or gas is produced in paying quantities, upon failure of production after the primary period the lease terminates by its own terms.

Under an Indian tribal oil and gas lease which provided as a condition to its existence that oil and gas be produced in paying quantities, upon a cessation of production no authority is vested in the Secretary of the Interior to allow a suspension of operations and thereby continue the term of the lease.

The Superior Oil Company and The British-American Oil Producing Company, IA-697 (Mar. 8, 1957) 64 I. D. 49

Assessments for compensatory royalties must be determined in accordance with the regulations (30 CFR 221.21(c)) and the terms of the lease.

While neither the lease nor the regulations furnish a strict guide for determining the loss by drainage, provision is made in those documents for computing the compensatory royalty due on the basis of estimates to be made by the oil and gas supervisor which estimate may be as high as 100 percent.

Pan American Petroleum Corporation (Formerly Stanolind Oil and Gas Company), IA-840 (Dec. 18, 1959)

INDIAN LANDS--Continued

MINERALS

The requirement in section 8(b) of the act of August 13, 1954 (68 Stat. 718), that the Secretary of the Interior transfer the sub-surface rights in trust or restricted land owned by members of the Klamath Tribe to one or more trustees becomes applicable at and after the date of the proclamation to be issued pursuant to section 18(a) of that act and does not apply to situations prior thereto.

Klamath Terminal Legislation, M-36284 (May 20, 1955) 62 I. D. 186

Where a statute requires an Indian to exchange lands for lands of equal value, land so exchanged carrying both surface and mineral rights will be replaced by lands carrying equal surface and mineral rights notwithstanding changes in law or regulation occurring subsequent to the date of the required exchange where no statute expressly prohibits the exchange of mineral rights.

Interpretation of the act of March 1, 1907 (34 Stat. 1015, 1035), as to Ownership of Mineral Rights Within the Blackfeet Indian Reservation in Montana, M-36325 (Jan. 23, 1956)

The grant of oil and gas to the allottee, or if such Indian is deceased, to his heirs or devisees, in lands allotted to him on or after March 3, 1927 (44 Stat. 1401), which reserved the oil and gas in his allotment to Indians having tribal rights on the Fort Peck Reservation, is not defeated by a conveyance from the allottee to the Fort Peck Tribe of all of his rights in the allotment prior to the enactment of the statutory grant of June 30, 1954 (68 Stat. 358).

Interpretation of the act of June 30, 1954 (68 Stat. 358), as to the Grant of Oil and Gas Underlying a Fort Peck Allotment, 3514, Dale Wing, Allottee, M-36360 (Aug. 13, 1956)

Deposits of sand and gravel in lands allotted or patented under the act of June 3, 1926 (44 Stat. 690), which can be shown as of the date of the allotment or patent to have a definite economic value by reason of the existence and nearness of a market in which they can be sold at a profit, are reserved to the Northern Cheyenne Tribe under the mineral reservation provided for in section 3 of the act.

Construction of the Mineral Reservation in the Act of June 3, 1926 (44 Stat. 690), as to Deposits of Sand and Gravel, M-36379 (Oct. 3, 1956)

INDIAN LANDS--Continued

MINERALS--Continued

The provisions of the act of June 30, 1919, reserving to the Blackfeet Tribe the minerals underlying lands on the Blackfeet reservation were superseded or supplemented by the provisions of the Indian Reorganization Act of 1934, under which it is permissible for the Secretary of the Interior to approve exchange of land between the tribe and its individual members with or without mineral reservations.

Ownership of Minerals Underlying Lands on the Blackfeet Indian Reservation in Montana as Between the Blackfeet Tribe and Individual Members of the Tribe, M-36393 (Dec. 26, 1956) 63 I. D. 408

A reservation for the "grantors" of oil, gas and minerals underlying an Indian trust or restricted allotment cannot be construed in the absence of additional clear language showing a contrary intent to vest any rights in the non-owning spouse of the Indian owner of a restricted allotment.

Interpretation of a Mineral Reservation in a Deed Conveying Allotted Indian Land, M-36400 (Feb. 4, 1957)

The requirement of the payment of the yearly rental was not abolished by the act of May 27, 1955 (69 Stat. 67; 25 U.S.C., 1956 Supp., sec. 463), on a mining claim validly initiated within the Papago Indian Reservation before the date of this act and maintained thereafter under the mining laws of the United States.

Yearly Rentals on Mining Claims Validly Initiated Before the Date of the Act of May 27, 1955, Within the Papago Indian Reservation, Arizona, M-36441 (June 25, 1957)

PATENTS

The oil and gas rights granted by the act to the Fort Peck allottees or their heirs or devisees is to be held in trust under sec. 3 unless they come within the conditions of the first exception thereto, automatically passing such rights to them in a fee status and unless they come within the conditions of the second exception authorizing and directing the Secretary to issue to them a patent in fee.

Interpretation of Sections 3 and 4 of Public Law 461, 83d Congress, Second Session, Approved June 30, 1954 (Fort Peck) /68 Stat. 358, 359/, M-36267 (Feb. 11, 1955)

INDIAN LANDS--Continued

PATENTS--Continued

It will be advisable for a member of the Klamath Tribe, who elects to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), at the time of his election and as a part of that election, to petition the Secretary of the Interior to issue to him, pursuant to section 8 of the act, a patent in fee for any trust lands, or to remove restrictions covering any restricted lands he might now or hereafter hold.

Klamath Terminal Legislation, M-36284 (May 20, 1955) 62 I. D. 186

The subsequent issuance and delivery of a patent in fee to a tract upon which a bidder's offer to lease had been accepted prevents the Department from granting a mineral lease covering such tract because the land has become unrestricted. Since the Indian owner of the tract has instituted litigation in that respect the deposit made for a lease on the tract will be held pending the outcome of the litigation or subject to further action by the parties interested in the deposit.

Plymouth Oil Company, IA-453 (July 15, 1955) 62 I. D. 262

Where the record relating to an exchange of lands between the tribe and an individual member of the tribe shows that the exchanged lands were of equal value with no indication of any intent on the part of the tribe to reserve the underlying minerals, a trust patent issued to the individual member without a mineral reservation must be held to constitute a valid conveyance not only of surface, but also of whatever mineral rights the tribe had in the lands.

Ownership of Minerals Underlying Lands on the Blackfeet Indian Reservation in Montana as Between the Blackfeet Tribe and Individual Members of the Tribe, M-36393 (Dec. 26, 1956) 63 I. D. 408

A decision not to issue a patent in fee for a restricted interest in allotted lands upon an Indian's application will not be disturbed upon appeal where there has been a failure to establish that the Indian applicant possesses the necessary ability or competency to manage his property affairs for his best interests.

Application of Clarence Longtree for a Patent in Fee, IA-854 (May 28, 1957)

INDIAN LANDS--Continued

PATENTS--Continued

Where land was patented to the Santo Domingo Pueblo in 1864 after confirmation of the Santo Domingo claim thereto based on a Spanish grant, the failure of the Pueblo Lands Board to include the land within the exterior boundaries of the Santo Domingo Pueblo grant, which boundaries the Board was required to identify and determine under the act of June 7, 1924, does not amount to a determination that the land is public land.

Nelson D. Jay, A-27468 (Dec. 4, 1957)

A decision not to issue a patent in fee for restricted allotted lands upon an Indian's application will not be disturbed on appeal where the record supports the conclusion that the applicant is incapable of managing her own affairs.

Application of Adelia Stricker for a Patent in Fee, IA-930 (Aug. 12, 1958)

Every patent for public or Indian lands carries with it an implied affirmation of finding of every fact made prerequisite to its issue.

Availability of Lands for Oil and Gas Leasing--Boundaries of the Fort Peck Indian Reservation, M-36539 (Nov. 19, 1958)

A decision not to issue a patent in fee for restricted allotted lands upon an Indian's application will not be disturbed on appeal where the record supports the conclusion that the applicant is incapable of managing his own affairs.

Application of William Big Horse for a Patent in Fee, IA-990 (Dec. 15, 1958)

POSSESSORY RIGHTS

Although the United States holds the legal title to lands within an Indian reservation set aside by formal treaty in consideration of a cession by the Indians of large areas of land claimed by them, the Indians have the right of occupancy of the reservation lands which is as sacred as the fee and carries with it all of the beneficial incidents of the fee.

Ownership of Unallotted Lands on the Tulalip Indian Reservation in the State of Washington, M-36181 (Feb. 21, 1956)

INDIAN LANDS--Continued

POSSESSORY RIGHTS--Continued

It would be an unconstitutional taking to permit the Klamath River (Yurok) Indians to diminish the value of the right of occupancy in Hoopa Valley by paying to them a part of the proceeds of the resources taken therefrom. The Hoopa Indians have occupied this part of the reservation since 1865 and the benefits of such occupancy belong to them.

Rights of Indians in the Hoopa Valley Reservation, California, M-36450 (Feb. 5, 1958) 65 I. D. 59

POWER

Where the Congress has clothed the Secretary of the Interior with authority to manage and operate an electric power system, that authority may not be transferred to a private utility or independent board without a clear indication on the part of Congress that such action may be taken.

Officers and employees of the United States are without authority to sell or lease property belonging to the United States unless specifically authorized by the Congress to do so.

An operating agreement between the Secretary of the Interior and private utilities defining the areas to be served by each may properly be entered into where the relevant statutes contain no prohibition against such an agreement.

Authority to Manage and Dispose of the San Carlos Power System, M-36296 (July 25, 1955) 62 I. D. 285

REMOVAL OF RESTRICTIONS

The subsequent issuance and delivery of a patent in fee to a tract upon which a bidder's offer to lease had been accepted prevents the Department from granting a mineral lease covering such tract because the land has become unrestricted. Since the Indian owner of the tract has instituted litigation in that respect the deposit made for a lease on the tract will be held

REMOVAL OF RESTRICTIONS--Continued

pending the outcome of the litigation or subject to further action by the parties interested in the deposit.

Plymouth Oil Company, IA-453 (July 15, 1955) 62 I. D. 262

The language of the act providing for the divesting of the title of the United States, upon a sale pursuant to a foreclosure of land mortgaged under the act, will vest in a loaning organization including a tribe or tribal loaning organization as purchaser, an unrestricted fee simple title to the land.

Interpretation of the act of March 29, 1956 (70 Stat. 62), as to the Resulting Status of the Title Acquired by a Tribe or Tribal Loaning Organization Upon a Foreclosure of a Mortgage, M-36361 (Aug. 6, 1956)

The restrictive status of Indian property subject to foreclosure pursuant to the terms of a mortgage or deed of trust executed and approved under authority of the act of March 29, 1956 (70 Stat. 62), is extinguished for the purposes designated in the act.

Foreclosure of Mortgages Given to Secure Loans Made by the Arapahoe Tribe, M-36341 (Aug. 15, 1956)

The act of March 29, 1956 (70 Stat. 62), clarifies and makes definite the authority to approve mortgages given the Secretary of the Interior and his duly authorized representative under prior acts. Certificates of indebtedness giving rise to a State statutory lien against real property for public assistance granted are not deemed to be mortgages which may be approved under authority of this act.

Interpretation of Act of March 29, 1956 (70 Stat. 62), as to Use of Approved Mortgages or Certificates of Lien on Indian Trust Lands for Enforcing Reimbursements of Public Assistance Grants in Montana to Indians, M-36370 (Nov. 29, 1956)

Restrictions existing on both the Kaw homestead allotments and restricted lands purchased by Kaw Indians with trust or restricted funds derived from Kaw sources, expired by law on January 1, 1948.

Restrictions on Individually-Owned Purchased Lands of Kaw Indians, Oklahoma, M-36538 (Nov. 10, 1958)

RIGHTS-OF-WAY

The act of June 17, 1954 (68 Stat. 250), terminates the responsibility of the United States to maintain and repair roads on the Menominee Indian Reservation after December 31, 1958, or upon such earlier date as the rights-of-way therefor are relinquished to the tribe or transferred to another agency under section 7.

Legal Obligations of the Federal Government on Menominee Roads, M-36300 (Aug. 2, 1955)

The Secretary of the Interior has authority to make a notation in a patent for tribal or allotted Indian land concerning the encumbrance thereon and such a notation is administratively desirable.

Effect of Terminal Legislation Upon Revocable Rights-of-Way and Other Real Property Encumbrances on Indian Lands, M-36369 (Sept. 17, 1956)

The act of February 5, 1948 (62 Stat. 17; 25 U. S. C. sec. 323), providing for "rights-of-way for all purposes" over and across Indian lands applies to sites for all features and facilities, including dams, reservoirs, powerplants, and construction and operating camps, appropriate to water control projects undertaken by the United States.

Utilization of Lands in the Navajo Indian Reservation for Glen Canyon Dam and Reservoir, M-36395 (Mar. 22, 1957) 64 I. D. 70

SALES AND EXCHANGE

Under section 9 of the act of August 13, 1954 (68 Stat. 718), (1) all trust and restricted property of members of the Klamath Tribe who die 6 months or more after the date of the act is subject to the probate jurisdiction of State courts; (2) if the State court orders a sale of such property in order to pay claims and probate expenses, the purchaser whether Indian or non-Indian, takes a fee simple title to the property sold; (3) if the court distributes such property to an Indian heir, such heir acquires the property in a trust or restricted status unless such status has been removed by operation of said act; but if the distributee or devisee is a non-Indian, the trust and restricted status is removed; (4) if the court decides it would be

INDIAN LANDS--Continued

SALES AND EXCHANGE--Continued

advantageous to cause a trust or restricted allotment to be leased during the period of probate, it must be leased in accordance with Federal rules and regulations; (5) the court, in probating such property, may appoint guardians ad litem to protect the interests of minors, incompetents or persons non compos mentis; (6) where the court orders a sale of such trust or restricted property, the United States is a necessary party to the proceedings therefor, and must be served with the petition for sale and accorded an opportunity to be heard. Service should be made upon the U. S. Attorney and upon the Attorney General of the United States; (7) heirs or devisees of Klamath Indians need not be qualified by the 1/16th degree Indian blood of the Klamath Tribe as formerly required; (8) trust and restricted estates of Klamath Indians who died prior to February 13, 1955, will be probated by the Federal Examiner of Inheritance and not by a State court.

The requirement in section 8(b) of the act of August 13, 1954 (68 Stat. 718), that the Secretary of the Interior transfer the sub-surface rights in trust or restricted land owned by members of the Klamath Tribe to one or more trustees becomes applicable at and after the date of the proclamation to be issued pursuant to section 18(a) of that act and does not apply to situations prior thereto.

Klamath Terminal Legislation, M-36284 (May 20, 1955) 62 I. D. 186

Exchange assignments on the Cheyenne River Reservation have by virtue of the act of July 14, 1954 (68 Stat. 467, 25 U.S.C. sec. 484), the same force and effect as trust patents issued pursuant to section 5 of the act of February 8, 1887 (24 Stat. 389, 25 U.S.C. sec. 348).

Cheyenne River Exchange Assignments, M-36354 (July 16, 1956)

A reservation for the "grantors" of oil, gas and minerals underlying an Indian trust or restricted allotment cannot be construed in the absence of additional clear language showing a contrary intent to vest any rights in the non-owning spouse of the Indian owner of a restricted allotment.

Interpretation of a Mineral Reservation in a Deed Conveying Allotted Indian Land, M-36400 (Feb. 4, 1957)

INDIAN LANDS--Continued

SALES AND EXCHANGE--Continued

In processing exchange applications of Indian trust patent allotments under the act of March 3, 1921 (41 Stat. 1239), 43 CFR 149.35 to 149.43, (1) where there are outstanding prior oil and gas applications or leases on the selected lands the outstanding prior oil and gas applications on the selected lands should be rejected, and the lands should be conveyed subject to any outstanding leases, and (2) where the selected lands are reported prospectively valuable for oil and gas, but are not under oil and gas application or lease there should not be any reservation or exception of minerals in the selected lands, but any minerals in the selected lands should be patented along with the lands. Nevertheless, the mandate of the regulation to exchange equal values must be kept in mind.

Mineral Reservations in Exchanges of Indian Trust Patent Allotments Under the Act of March 3, 1921, M-36436 (May 9, 1957)

(1) Sales of trusteed allotted Indian lands on Wind River Indian Reservation made prior to February 14, 1920, are free of construction charges for irrigation ditches existing at time of sale, in absence of specific agreement to the contrary; such sales made subsequently are subject to these charges, in absence of specific agreement to the contrary.

(2) Sales of fee patented allotted Indian lands on Wind River Indian Reservation made prior to February 14, 1920, are free of construction charges for irrigation ditches existing at time of sale, in absence of specific agreement to the contrary; as to such sales made subsequently, liability for these charges depends upon whether or not the purchaser assumed it.

(3) In any event, in the case of both trusteed and fee patented allotted Indian lands, the lien imposed by the Act of March 7, 1928, for construction, operation and maintenance charges runs with the land.

Collection of Accrued and Unpaid Construction Charges Against Non-Indian Lands of the Wind River Indian Irrigation Project, Wyoming, M-36479 (Nov. 26, 1958)

TIMBER

The enactment of the act of August 13, 1954 (68 Stat. 712), does not prevent the sale of timber on the Klamath Indian Reservation where the timber sale contract will be completed within the 4-year limitation period fixed by the act

INDIAN LANDS--Continued

TIMBER--Continued

and the sale will not interfere with the purposes of the act.

Timber Sales and Tribal Loans, Klamath Reservation, Oregon, M-36257 (Jan. 14, 1955)

The unentered and undisposed of ceded Indian lands of the Red Lake Indian Reservation restored to the Indians and to their reservation by Secretarial order of February 22, 1945, issued pursuant to sections 3 and 7 of the Indian Reorganization Act (48 Stat. 984), as amended, were properly restored to Indian ownership, and the timber on such restored lands may be sold under applicable laws and regulations.

Status of Land Lying Within a Defined 60-foot Boundary Line Between the United States and Canada, M-36368 (Sept. 12, 1956)

There appears to be no authority, at present, for payment of the amount now on deposit in the United States Treasury in an account designated "Proceeds of Labor, Hoh Indians, Washington" (1) to any individual, (2) to the residents of the Hoh Reservation, or (3) a group of Indians self-styled the "Hoh Tribe of Indians" as owners because none of these or any other group of Indians appear to be entitled to the proceeds by reason of a definite equitable ownership of the land comprising the reservation.

Ownership of Proceeds of Sale of Timber, Hoh Reservation, Washington, M-36413 (Feb. 8, 1957)

The Secretary of the Interior may not, in sales made pursuant to the provision of the act of August 13, 1954 (68 Stat. 718; 25 U.S.C. sec. 564), require that the purchasers agree, as part of the terms of the sale, to manage the purchased timber lands on what is known as sustained yield management principles, as such requirement would reduce the sales value of the land below "fair value."

Sale of Klamath Indian Timber Subject to Sustained-Yield Management Covenant, M-36444 (May 10, 1957)

Where a contract for the sale of Indian timber authorizes the Secretary to redetermine stumpage prices upon a finding of changed conditions, the Secretary has broad discretion to consider those factors and use those tests and methods of valuation which a capable and prudent businessman would use.

INDIAN LANDS--Continued

TIMBER--Continued

Where a contract for the sale of Indian timber, pursuant to either sections 7 or 8 of the act of June 25, 1910 (36 Stat. 857; 25 U.S.C. secs. 406 or 407), is supported by adequate consideration, no new consideration is required to support a change in price or ratio pursuant to a redetermination of price or ratio clause contained in the contract. Consideration adequate for the original contract is sufficient to support several distinct stipulations by either party to do, or refrain from doing, further acts.

Contracts for the sale of timber on any Indian allotment or on unallotted tribal lands pursuant to sections 7 and 8 of the act of June 25, 1910 (36 Stat. 857; 25 U.S.C. secs. 406 and 407), are not public contracts so as to be subject to all the special laws pertaining to such contracts.

Construction of a Contract for the Sale of Indian Timber, M-36461 (July 22, 1957) 64 I. D. 305

Although no clear authority has been delegated to the Secretary of the Interior to dispose of timber upon allotted Indian land without the consent, express or implied, of all co-owners, he has authority, and also a responsibility to approve and facilitate the sale or other salvage of timber thereon without obtaining unanimous consent, in order to prevent loss from fire, decay, insect infestation or disease.

Consent of Indians for Sale of Allotted Timber, M-36477 (Mar. 5, 1958) 65 I. D. 101

Where there is a question as to whether tribal resources, such as timber or lands, are held as an asset of the tribal municipal corporation, organized under section 16 of the Indian Reorganization Act (25 U. S. C., 1952 ed., sec. 476) or as an asset of the tribal business corporation organized under section 17 of said act (25 U. S. C., 1952 ed., sec. 477), ownership by the tribe rather than by the business corporation will be presumed in the absence of a clear showing to the contrary.

Timber as a Capital Asset of the Blackfeet Tribe, M-36545 (Dec. 16, 1958)

INDIAN LANDS--Continued

TRIBAL LANDS

Generally

Section XI of the act of September 3, 1954 (68 Stat. 1191, 1193) provides for purchase by the United States and reconveyance under trust patent to individual Indians, members of the Tribe of Sioux Indians of the Cheyenne River Reservation, whose lands are within the taking area of the Oahe Dam upon selection by them of lands within or outside the Reservation as diminished and further provides that no prior Act of Congress, Departmental regulation or Tribal Constitution, ordinance or resolution pursuant to law or regulation shall be a bar to the operation of the section. It is considered that by the wording of section XI the Congress has expressed its intent to authorize selections of tribal land and purchase by the United States as well as conveyance by the Tribe of all its interests in such selected Tribal lands.

Interpretation of Section XI of the Act of September 3, 1954 (P. L. 776, 83d Cong.; 68 Stat. 1191, 1193), M-36283 (May 12, 1955)

Nothing in the Executive Order of October 16, 1891, indicates an intent to confer upon the Klamath River Indians an interest in the realty of the original Hoopa Valley Reservation. Despite the enlargement of the original Hoopa Valley Reservation, the Klamath River Tribe was never merged with nor absorbed into the Hoopa Valley Tribe. Therefore, the fact that the Hoopa Valley Tribe limited the scope of its jurisdiction under its 1949 constitution does the Klamath River Indians no injustice. As an independent tribal group, neither the Klamath River Indians nor their successors, the Yuroks, have any property right in the original 12-mile square.

Rights of Indians in the Hoopa Valley Reservation, California, M-36450 (Feb. 5, 1958) 65 I. D. 59

Alienation

Since section 6(b) of the act of August 13, 1954 (68 Stat. 718), provides that "all of the actions required by sections 5 and 6 of this Act shall be completed at the earliest practicable time and in no event later than four years from the date of this Act," sales of land pursuant to section 5 of the act may not be made subsequent to August 13, 1958.

Klamath Terminal Legislation, M-36284 (May 20, 1955) 62 I. D. 186

INDIAN LANDS--Continued

TRIBAL LANDS--Continued

Alienation--Continued

Where a statute requires an Indian to exchange lands for lands of equal value, land so exchanged carrying both surface and mineral rights will be replaced by lands carrying equal surface and mineral rights notwithstanding changes in law or regulation occurring subsequent to the date of the required exchange where no statute expressly prohibits the exchange of mineral rights.

Interpretation of the act of March 1, 1907 (34 Stat. 1015, 1035), as to Ownership of Mineral Rights Within the Blackfeet Indian Reservation in Montana, M-36325 (Jan. 23, 1956)

Where a lease was executed by a Principal Chief of the Seminole Indian Nation whose appointment was subsequently revoked ab initio, it is not necessary to re-execute such lease if the lessor was de facto Principal Chief of the Seminole Nation at the time the lease in question was signed by him and on the date the lease was approved in the Department of the Interior.

Authority of the Principal Chief of the Seminole Indian Nation and the General Council of the Seminole Indian Nation Under Pertinent Acts of Congress, M-36471 (Aug. 29, 1957)

An Executive Order reservation withdrawal from the public domain "For the Ozette Indians not now residing upon any Indian reservation" may be revoked if in fact there are no longer any living Indians identifiable as members of the Ozette Tribe. In such case, the equitable estates merge in the United States and the trust is terminated.

Status of Ozette Reservation, Washington, M-36456 (Nov. 21, 1957) 64 I. D. 435

WATER RIGHTS

Water adjudicated for the irrigation of lands of the Indians of the Pyramid Lake Reservation is not available for diversion into Pyramid Lake for the propagation of fish.

Water not diverted and used must be allowed to flow downstream for the benefit of other users with subsequent rights in the stream.

INDIAN LANDS--Continued

WATER RIGHTS--Continued

The right to divert and use water for irrigation is not a right of ownership in the corpus of the water before its diversion into ditches or canals of the party entitled to use the water.

Adjudicated Right for Use of Water for Irrigation, M-36282 (May 5, 1955)

The term "subsurface rights" as used in section 8 (b) of the act of August 13, 1954 (68 Stat. 718), does not include water rights.

Section 14(a) of the act of August 13, 1954 (68 Stat. 718), defers the application of the laws of Oregon with respect to the abandonment of water rights by the Klamath Tribe or its members for a period of 15 years after the date of the proclamation issued pursuant to section 18 of that act. Except for such deferment, section 14(a) is merely a saving clause which operates to preserve whatever water rights the tribe and its members may have under the law in force on the date of the act.

Klamath Terminal Legislation, M-36284 (May 20, 1955) 62 I. D. 186

An allotment to an Indian of the Colville Reservation made under section 4 of the act of July 1, 1892 (27 Stat. 62), on the ceded area of the reservation became entitled to share in the available waters for the irrigation thereof under the doctrine of the Winters case.

Public domain allotments made subsequent to the creation of the State in which situated and which were never a part of an Indian reservation would be subject to the laws of the State in the acquisition of a water right for such land.

Water Rights for Indian Allotments on Ceded Lands and Public Domain, M-36289 (Aug. 19, 1955)

The indenture between the City of Los Angeles and the United States creates a vested right to use a particular quantity of water on four tracts of land conveyed to the United States and its assigns by the city. Issuance of a patent on such lands in no way terminates the obligation of the city as promised in the deed.

Water Rights of Bishop, Big Pine and Lone Pine Reservations, California, M-36334 (Mar. 16, 1956)

INDIAN LANDS--Continued

WITHDRAWALS

An Indian reservation established pursuant to the inherent or implied power of the Executive to make withdrawals of public lands in the public interest, including the withdrawal of lands for Indian use, is not subject to the limitations and conditions contained in the act of June 25, 1910, and the reservation lands are not open to the mining of metalliferous minerals, as provided in that act.

Application of the act of June 25, 1910, to the Klukwan Indian Reservation in Alaska, M-36396 (Dec. 13, 1956)

The Executive order of November 11, 1907, withdrawing certain lands for Indian purposes and containing a proviso that "this withdrawal shall not affect any existing valid rights of any party" applied to lands owned by the Territory of New Mexico at the date the order was signed but which thereafter became public lands of the United States.

Availability for Leasing of Certain Lands on the Jicarilla Apache Indian Reservation, M-36507 (Mar. 14, 1958) (Memorandum from Regional Solicitor, Denver, Colorado, to State Supervisor, Bureau of Land Management, Santa Fe, New Mexico.)

INDIAN REORGANIZATION ACT

Section 16 of the Indian Reorganization Act (25 U.S.C. sec. 476; 48 Stat. 987) requires that elections for the adoption of governmental constitutions and their amendment shall be by special election called by the Secretary of the Interior. The rules for the "elections on the adoption of Constitutions and Constitutional Amendment" were approved by the Secretary of the Interior August 20, 1935, and amended October 18, 1935, and March 24, 1938. These rules provide that "non-resident members may vote by absentee ballot." The Solicitor's opinion (M-36141) dated July 18, 1952, is modified to permit the use of absentee ballots by nonresident members in elections to amend constitutions adopted pursuant to the Indian Reorganization Act.

Blackfeet Tribal Constitution, M-36346 (June 8, 1956)

The Secretary of the Interior has authority under the Indian Reorganization Act (25 U.S.C. secs. 476, 477; 48 Stat. 987) to call special elections to (a) determine whether a majority of the adult Indians desire to vote against the application of the act itself to the reservation with which they are connected; (b) to determine whether a proposed constitution and bylaws shall be ratified; (c) to ascertain whether such constitution and bylaws shall be amended; and (d) to determine whether such constitution and bylaws shall be revoked. Otherwise in the case of tribal governments incorporated under section 16 of the Indian Reorganization Act, supra, the Secretary, unless granted authority by the tribal constitution or act of Congress, may not call tribal elections to elect councilmen.

Fort Berthold Tribal Affairs, M-36350 (June 20, 1956) 63 I. D. 188

Exchange assignments on the Cheyenne River Reservation have by virtue of the act of July 14, 1954 (68 Stat. 467, 25 U.S.C. sec. 484), the same force and effect as trust patents issued pursuant to section 5 of the act of February 8, 1887 (24 Stat. 389, 25 U.S.C. sec. 348).

Cheyenne River Exchange Assignments, M-36354 (July 16, 1956)

The unentered and undisposed of ceded Indian lands of the Red Lake Indian Reservation restored to the Indians and to their reservation by Secretarial order of February 22, 1945, issued pursuant to sections 3 and 7 of the Indian Reorganization Act (48 Stat. 984), as amended, were properly restored to Indian ownership, and the timber on such restored lands may be sold under applicable laws and regulations.

Status of Land Lying Within a Defined 60-foot Boundary Line Between the United States and Canada, M-36368 (Sept. 12, 1956)

Whether or not the minerals were reserved to the tribe or conveyed to the allottee, in exchanges occurring subsequent to the enactment of the Indian Reorganization Act of 1934, depends on the facts in each case, and in the absence of any binding agreement to the contrary, ownership of the minerals will be controlled by the recitals contained in the instruments of conveyance.

Ownership of Minerals Underlying Lands on the Blackfeet Indian Reservation in Montana as Between the Blackfeet Tribe and Individual Members of the Tribe, M-36393 (Dec. 26, 1956) 63 I. D. 408

The act of July 17, 1914, permitting the appropriation and patenting, with a mineral reservation in the United States, under the nonmineral land laws of lands withdrawn, classified, or valuable for specified minerals is not applicable to the restoration of ceded Indian lands to tribal ownership under the Indian Reorganization Act.

Arthur F. C. Hoffman, A-27541 (Feb. 7, 1958)

Section 16 of the Indian Reorganization Act was enacted to facilitate and to stabilize tribal political organizations. Section 17 was enacted to permit a tribe so organized to charter a business corporation to facilitate its business activities. They are separate legal entities, having different powers, privileges and responsibilities.

Request for Interpretive Opinion on the Separability of Tribal Organizations Organized Under Sections 16 and 17 of the Indian Reorganization Act, M-36515 (Nov. 20, 1958) 65 I. D. 483

Limitations prescribed by State law are not applicable to wills made by Indians in disposing of trust or restricted property, unless adopted in the regulations promulgated by the Secretary of the Interior respecting Indian wills.

The right of Indians to dispose of restricted property by will without regard to limitations imposed by State law is not modified or affected by section 4 of the Indian Reorganization Act.

Estate of Harry Shale, Quinaielt No. 408, IA-880 (Nov. 21, 1958)

Where there is a question as to whether tribal resources, such as timber or lands, are held as an asset of the tribal municipal corporation, organized under section 16 of the Indian Reorganization Act (25 U. S. C., 1952 ed., sec. 476) or as an asset of the tribal business corporation organized under section 17 of said act (25 U. S. C., 1952 ed., sec. 477), ownership by the tribe rather than by the business corporation will be presumed in the absence of a clear showing to the contrary.

Powers of a tribe organized under section 476 of Title 25 U. S. C. are so broad that where a power is vested in any Indian tribe or its tribal council by existing law, in accordance with such law, and are not spelled out in the constitution or are not voluntarily relinquished or modified, such power can be read into the constitution.

INDIAN REORGANIZATION ACT--Continued

Where a tribal constitution (25 U. S. C., 1952 ed., sec. 476) refers to provisions of a tribal corporate charter (25 U. S. C., 1952 ed., sec. 477), the terms of the charter specifically so mentioned, will be deemed incorporated by reference into the tribal constitution and will be binding on the tribal municipal corporation.

Timber as a Capital Asset of the Blackfeet Tribe, M-36545 (Dec. 16, 1958)

INDIAN TRIBES

GENERALLY

The provision of Item (e) of the act of August 3, 1956, 70 Stat. 982, stating that the Secretary of the Interior is to employ with the consent of the Tribal Council, such persons and use such means as he may find necessary to carry out the purposes of the foregoing provisions, is interpreted as meaning that the authority of the Secretary of the Interior to employ individuals is modified by the phrase "with the consent of the Tribal Council" only to the extent that the Tribal Council's consent is necessary for the initial selection of individuals to fill the particular positions in connection with the operations of the Red Lake tribal sawmill.

Interpretation of Item (e) of the Act of August 3, 1956, 70 Stat. 982, Relating to the Management of the Red Lake Indian Forest and Sawmill, M-36380 (Oct. 5, 1956)

Absent tribal action prescribing formal procedures to be followed to effect a valid Indian custom marriage, proof of such a marriage can be based upon the actions of the parties themselves, their intent, and the manner in which their associations together were regarded by others.

Estate of Adeline Stamill Goudy, Unallotted Yakima Indian, IA-517 (Feb. 11, 1957)

A tribe organized under section 16 of the Indian Reorganization Act is a political body and is a separate entity from a corporation chartered under section 17 of the Indian Reorganization Act, having different powers, privileges and responsibilities.

Request for Interpretive Opinion on the Separability of Tribal Organizations Organized Under Sections 16 and 17 of the Indian Reorganization Act, M-36515 (Nov. 20, 1958) 65 I. D. 483

INDIAN TRIBES--Continued

ATTORNEYS

So long as an attorney contract with an Indian tribe or group remains in force another contract with a different attorney covering the same representation will not be approved.

James C. Peacock, IA-151 (Jan. 6, 1955)

CONSTITUTIONS

A provision in a tribal constitution granting a preference right to acquire leases on tribal lands upon the payment of reasonable fees for the use of the lands cannot properly be construed to extend to oil leases where the constitution contains a separate provision covering the disposition of oil leases without any provision for a noncompetitive preference right.

Preference Right to Oil and Gas Leases on the Blackfeet Reservation, M-36306 (Sept. 29, 1955)

Where it is desirable to reduce to writing existing constitutions or rewrite in substantially new and changed form the constitution and bylaws of an Indian tribe or association not incorporated under section 16 of the Indian Reorganization Act, under the provisions of Departmental Circular 3160, dated May 5, 1936, such proposed constitution and bylaws shall be forwarded to Washington for approval, and, if approved, be sent back for ratification by the qualified voters of the tribe (those listed on the census rolls) for referendum by secret ballot.

Where the constitution and bylaws of an Indian tribe or other Indian association makes no provision for removing officers or members of their governing body, the General Council has the authority to remove officers and Executive Board members at its discretion. The General Council is made up of all members of the organization eligible to participate and as such can determine the desirability of continuing persons in office unless limited by their constitution and bylaws.

Where actions have been taken by an Indian General Council or Executive Board of a group not incorporated under the provisions of section 16 of the Indian Reorganization Act in substantial compliance with the provisions of a constitution or bylaws, such actions will be liberally construed to find compliance and will not be rejected for failure to give that strict compliance as would be expected of a non-Indian group such as a business corporation or State

INDIAN TRIBES--Continued

CONSTITUTIONS--Continued

political unit. However, at least a minimum of compliance must be found so as to indicate a sincere effort on the part of the Indian group to comply with the intent of the document as interpreted in the light of the Indian practices and customs of the group involved.

Fort Peck Tribal Affairs, M-36342 (Apr. 23, 1956)

Section 16 of the Indian Reorganization Act (25 U.S.C. sec. 476; 48 Stat. 987) requires that elections for the adoption of governmental constitutions and their amendment shall be by special election called by the Secretary of the Interior. The rules for the "elections on the adoption of Constitutions and Constitutional Amendment" were approved by the Secretary of the Interior August 20, 1935, and amended October 18, 1935, and March 24, 1938. These rules provide that "non-resident members may vote by absentee ballot." The Solicitor's opinion (M-36141) dated July 18, 1952, is modified to permit the use of absentee ballots by nonresident members in elections to amend constitutions adopted pursuant to the Indian Reorganization Act.

Blackfeet Tribal Constitution, M-36346 (June 8, 1956)

The Secretary of the Interior has authority, under the Indian Reorganization Act (25 U.S.C. secs. 476, 477; 48 Stat. 987) to call special elections to (a) determine whether a majority of the adult Indians desire to vote against the application of the act itself to the reservation with which they are connected; (b) to determine whether a proposed constitution and bylaws shall be ratified; (c) to ascertain whether such constitution and bylaws shall be amended; and (d) to determine whether such constitution and bylaws shall be revoked. Otherwise in the case of tribal governments incorporated under section 16 of the Indian Reorganization Act, supra, the Secretary, unless granted authority by the tribal constitution or act of Congress, may not call tribal elections to elect councilmen.

Fort Berthold Tribal Affairs, M-36350 (June 20, 1956) 63 I. D. 188

Failure of the Secretary of the Interior to disapprove a Tribal Council ordinance which is inconsistent with the tribal constitution does not validate the ordinance.

Membership--Confederated Salish and Kootenai Tribes of the Flathead Reservation, M-36476 (Mar. 3, 1958) 65 I. D. 97

INDIAN TRIBES--Continued

CONSTITUTIONS--Continued

Where there is a question as to whether tribal resources, such as timber or lands, are held as an asset of the tribal municipal corporation, organized under section 16 of the Indian Reorganization Act (25 U. S. C., 1952 ed., sec. 476) or as an asset of the tribal business corporation organized under section 17 of said act (25 U. S. C., 1952 ed., sec. 477), ownership by the tribe rather than by the business corporation will be presumed in the absence of a clear showing to the contrary.

Powers of a tribe organized under section 476 of Title 25 U. S. C. are so broad that where a power is vested in any Indian tribe or its tribal council by existing law, in accordance with such law, and are not spelled out in the constitution or are not voluntarily relinquished or modified, such power can be read into the constitution.

Where a tribal constitution (25 U. S. C., 1952 ed., sec. 476) refers to provisions of a tribal corporate charter (25 U. S. C., 1952 ed., sec. 477), the terms of the charter specifically so mentioned, will be deemed incorporated by reference into the tribal constitution and will be binding on the tribal municipal corporation.

Timber as a Capital Asset of the Blackfeet Tribe, M-36545 (Dec. 16, 1958)

FISCAL MATTERS

Under section 16 of the act of August 13, 1954 (68 Stat. 718), per capita payments may be made from the capital reserve fund of the Klamath Tribe established by 50 Stat. 872.

Klamath Terminal Legislation, M-36284 (May 20, 1955) 62 I. D. 186

Uncollectible obligations owed to the United States by associations of Alaskan natives organized and exercising the functions of government under a constitution approved pursuant to the acts of June 18, 1934 (48 Stat. 984), and May 1, 1936 (49 Stat. 1250), may be canceled under authority provided in the Leavitt Act (47 Stat. 564; 25 U.S.C. sec. 386a), but similar obligations of Indian livestock associations organized under the Oklahoma Welfare Act (49 Stat. 1967; 25 U.S.C. sec. 504) cannot be included in cancellation orders provided for in the Leavitt Act, supra.

Proposed Cancellation of Indebtedness to the United States, M-36409 (Mar. 27, 1957)

INDIAN TRIBES--Continued

FISCAL MATTERS--Continued

The act of May 7, 1948, 25 U. S. C. sec. 482, authorized loans to tribes, bands, groups and individual Indians. The Seminole Tribe of Oklahoma is recognized by the Department of the Interior as a tribal entity and should be considered eligible for a loan from the revolving fund.

Authority of Seminole Tribe of Oklahoma to Borrow Money and Pledge Assets as Security for Loan From Revolving Fund, M-36482 (Oct. 29, 1957)

There is no legal objection to the imposition of the tribal sales tax designated by Tribal Business Council resolution. The tax is enforced against all of a class, namely, those who have produced livestock and crops "as a result of revolving credit financing." The borrowers were or should have been aware of the tax prior to their application for loans.

Sales Tax, Three Affiliated Tribes of the Fort Berthold Reservation, M-36448 (Mar. 3, 1958)

The term "capital assets" as used in Indian corporate charters (25 U. S. C., 1952 ed., sec. 477) may ordinarily be construed as similar to "fixed assets" which are those held for the purpose of conducting the business undertaken by the corporation in contradistinction to those assets which are destined to be converted into cash or continuously disposed of in the ordinary course of business.

Timber as a Capital Asset of the Blackfeet Tribe, M-36545 (Dec. 16, 1958)

MEMBERSHIP

Under the provisions of section 7(b) of the act of May 24, 1950 (64 Stat. 189), an applicant for enrollment as a California Indian must prove his relationship to a person related to him as prescribed in the statute whose name appears on the 1933 California Indian roll, and upon the failure of such proof the application must be denied.

Porfirio Ludovico Cosio, IA-156 (Feb. 18, 1955)

Under the provisions of section 5(a)(2) of the act of August 13, 1954 (68 Stat. 718), which allows "each adult member of the /Klamath/ tribe * * * an opportunity to elect for himself,

INDIAN TRIBES--Continued

MEMBERSHIP--Continued

and, in the case of a head of a family, for the members of the family who are minors" to withdraw from or remain in the tribe: (1) when the parents of a child are separated and the child is living with one of the parents, the latter parent may make the decision for the child to withdraw; (2) when the parents of a child are separated and the child is living with some third person, the question of who is the head of the minor's family is one of fact which must be considered in each case; (3) where the child has a judicially appointed guardian of his person and his property, the guardian may not elect for the child unless the guardian is otherwise qualified as an adult member and head of the family of the minor; (4) if the child is an orphan who is living in an institution where he cannot be considered as a member of the family of an adult Klamath Indian, no one may make the decision for him to withdraw; (5) an adult member of the tribe who has judicially been deprived of control over his child may not make an election for his child to withdraw; (6) a parent who is judicially declared to be non compos mentis may not elect for himself or his child to withdraw; and (7) an adult member who is the head of a family may make the decision to withdraw for his wife if she is under, but not if she is over, 21 years of age.

An adult member of the Klamath Tribe, if incompetent, insane or non compos mentis may not, under section 5(a)(2) of the act of August 13, 1954 (68 Stat. 718), make an election to withdraw from the tribe.

A judicially appointed guardian for an adult member of the Klamath Tribe who is insane, incompetent or non compos mentis may not, under the provisions of section 5(a)(2) of the act of August 13, 1954 (68 Stat. 718), make an election for him to withdraw from the tribe.

Should a member of the Klamath Tribe, who has elected to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), inherit an interest of a member who has elected to remain in the tribe, the withdrawing member would not acquire by such inheritance the decedent's right to vote as a member of the tribe.

Members of the Klamath Tribe who elect to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), remain tribal members and may participate in tribal affairs to the same extent as any member until they have been paid in full the money value of their interests in tribal property.

Klamath Terminal Legislation, M-36284 (May 20, 1955) 62 I. D. 186

INDIAN TRIBES--Continued

MEMBERSHIP--Continued

The determination of the full-blood membership of the Ute Tribe of the Uintah and Ouray Reservation in Utah for the purpose of participating in the development program provided for in section 24 of the act of August 27, 1954 (68 Stat. 868; 25 U.S.C. sec. 677), is controlled by the provisions of the act and not by the constitution and bylaws of the Ute Indian Tribe.

Determination of Full-Blood Membership of Ute Tribe for Purpose of Participation in Development Program Provided for in act of August 27, 1954, M-36304 (Sept. 6, 1955)

The Secretary is without authority to approve a transfer of a minor from the full-blood roll to the mixed-blood roll under section 4 of the act of August 27, 1954 (68 Stat. 868).

Transfer of Minor Full-Bloods to the Mixed-Blood Roll Under Section 4 of the act of August 27, 1954 (68 Stat. 868), M-36305 (Sept. 21, 1955)

The act of August 30, 1954 (68 Stat. 979, 25 U.S.C. sec. 771), is construed to authorize the Secretary of the Interior to prepare separate rolls of persons of Indian blood, whose ancestors were members of the tribes involved, without distinction as to how the ancestors acquired such membership and that the language "of the blood of the tribe" should, in view of the legislative intent found by a study of the congressional reports on the bill, be interpreted to include any bona fide member of the tribe whose ancestors would have been accepted as such under Indian law.

Interpretation of the act of August 30, 1954 (68 Stat. 979, 25 U.S.C.A. 771), M-36328 (Jan. 16, 1956)

Under a statute providing that the names of certain classes of persons shall be placed on the tribal membership roll and providing further that only enrolled members shall be entitled to inherit, an apparent heir may be unenrolled at the date of his ancestor's death and yet be entitled to enrollment as a matter of right, thus becoming qualified to inherit.

Devolution of Yakima Indian Estates, M-36331 (Mar. 16, 1956)

INDIAN TRIBES--Continued

MEMBERSHIP--Continued

The act of August 27, 1954 (68 Stat. 868, 25 U.S.C. secs. 677-677aa), provides for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members in preparation for termination of Federal supervision over their properties. 25 U.S.C. sec. 677g provides for a roll of the full-blood members of the tribe, living on August 27, 1954, which roll shall be final for the purposes of the act. Nothing in the act makes the interest of a full-blood member inheritable or devisable. Since no persons born after the date of the act can qualify as full-blood members for inclusion on the final roll, subsequently born full-blood children have no rights to the assets of the tribe except such rights as may be extended to them under the development program called for by section 24 of the act (25 U.S.C. sec. 677w).

Inheritable Status of Interest of Full-Blood Member of the Ute Indian Tribe of Utah Under the Act of August 27, 1954 (68 Stat. 868, 25 U.S.C. Secs. 677-677aa), M-36339 (Mar. 28, 1956)

The fact that an heir who was enrolled with the Creek Tribe of the Five Civilized Tribes had received an allotment of land with another tribe of Indians justified action by the Commission to the Five Civilized Tribes and the Secretary of the Interior striking the heir's name from the Creek roll, which action was final after the passage of the act of April 26, 1906 (34 Stat. 137).

The authority of the Commission to the Five Civilized Tribes and of the Secretary of the Interior to strike names from the rolls of the Five Civilized Tribes, after notice and an opportunity to be heard, continued to March 4, 1907, when the rolls were closed.

Jurisdiction Over Property Belonging to a Five Tribes Indian's Estate, M-36455 (July 12, 1957) 64 I. D. 280

Failure of the Secretary of the Interior to disapprove a Tribal Council ordinance which is inconsistent with the tribal constitution does not validate the ordinance.

Membership--Confederated Salish and Kootenai Tribes of the Flathead Reservation, M-36476 (Mar. 3, 1958) 65 I. D. 97

INDIAN TRIBES--Continued

PARTICULAR TRIBES

Five Civilized Tribes

The property comprising the restricted estate of a Five Tribes Indian decedent continues restricted and subject to the jurisdiction of the Secretary of the Interior only so long as belonging to Indian heirs of one-half or more Indian blood computed from the final rolls of the Five Civilized Tribes pursuant to the act of August 4, 1947 (61 Stat. 731).

The authority of the Commission to the Five Civilized Tribes and of the Secretary of the Interior to strike names from the rolls of the Five Civilized Tribes, after notice and an opportunity to be heard, continued to March 4, 1907, when the rolls were closed.

The fact that an heir who was enrolled with the Creek Tribe of the Five Civilized Tribes had received an allotment of land with another tribe of Indians justified action by the Commission to the Five Civilized Tribes and the Secretary of the Interior striking the heir's name from the Creek roll, which action was final after the passage of the act of April 26, 1906 (34 Stat. 137).

Jurisdiction Over Property Belonging to a Five Tribes Indian's Estate, M-36455 (July 12, 1957) 64 I. D. 280

The duties of the Principal Chief of the Seminole Indian Nation are confined to the execution of deeds of conveyance on leases submitted to him by the Secretary of the Interior. The remaining tribal lands of the Seminole Nation cannot be disposed of by the Secretary of the Interior under existing law without the approval of the General Council.

Authority of the Principal Chief of the Seminole Indian Nation and the General Council of the Seminole Indian Nation Under Pertinent Acts of Congress, M-36471 (Aug. 29, 1957)

RESERVATIONS

Where an Executive Order establishing an Indian reservation of public lands of the United States, including an unsurveyed area of accreted lands, provides that a sector of the reservation boundary shall follow what will be a section line of the public survey when extended, the Indians have no right as riparian owners to the accreted

INDIAN TRIBES--Continued

RESERVATIONS--Continued

lands found to lie between such projected section line, when established, and the waters of an adjacent river.

Title to Accretion Lands Adjacent to Cocopah Indian Reservation, Arizona, M-36275 (April 15, 1955)

Tribal royalties from Government leases for the development of oil and gas resources on the Fort Peck Indian Reservation, Montana, are subject to the privilege and license tax authorized by the State under an act of Congress which provides that the State may tax the production of oil and other minerals produced from restricted Indian lands the same as if produced from privately-owned lands.

Right of the State to Impose a Privilege and License Tax Against the Royalty Interest of the Indian Tribes of the Fort Peck Reservation, Montana, M-36310 (Oct. 13, 1955)

The act of August 9, 1955 (69 Stat. 540), applies generally to the leasing of restricted Indian lands wherever situated, including reservations such as the Crow Reservation, where special leasing statutes had theretofore been enacted, thus supplying additional leasing authority without displacing or superseding the special statutes.

Application of the General Leasing Act of August 9, 1955 (69 Stat. 540), to the Crow Indian Reservation, Montana, M-36318 (Dec. 15, 1955) 62 I. D. 469

The Indian title to the unallotted lands on the Tulalip Indian Reservation in the State of Washington, which reservation was set aside pursuant to a treaty concluded in 1855 between the United States and a large number of tribes or bands located west of the Cascade Mountains, is now vested in the Indians located on the reservation who organized and incorporated pursuant to the provisions of the Indian Reorganization Act of 1934 under the corporate name of "The Tulalip Tribes of the Tulalip Reservation."

Where a large number of Indian tribes or bands enter into a treaty with the United States which has for its purpose the consolidation on the reservation of those individual members of the several tribes or bands who desire to take advantage of the privilege of settling on the reservation and of taking allotments there, the treaty does not constitute a grant in praesenti of the title to the reservation land to the treaty tribes or bands as entities.

INDIAN TRIBES--Continued

RESERVATIONS--Continued

Under such a treaty the privilege of removing to and enjoying the benefits of the reservation is extended to those members of the several tribes and bands who elect to remove to and settle upon the reservation, whereupon they become invested with the full incidents of Indian title.

Ownership of Unallotted Lands on the Tulalip Indian Reservation in the State of Washington, M-36181 (Feb. 21, 1956)

Descendants of Ozette Indians who abandoned the reservation relinquished all rights thereon when they did not return to cast their votes to determine the future of the reservation lands when the election was held in 1935. It is believed that all those persons desiring to preserve a tribal relationship cast their votes in similar elections as residents of other reservations.

The mere fact that the Ozettes were historically a branch or part of the Makah Tribe does not give the Makah Tribe any rights to the Ozette reservation.

Status of Ozette Reservation, Washington, M-36456 (Nov. 21, 1957) 64 I. D. 435

Inasmuch as the Indian Reorganization Act provided a method of uniting the Hoopa and Klamath River Tribes, and both tribes rejected such a plan, it is our opinion that these groups remain and must be recognized as independent tribal groups until such time as they affirmatively and voluntarily form a consolidated governmental body having jurisdiction over the total reservation both as to government and as to economic resources. Such a confederation or consolidation has not taken place.

Rights of Indians in the Hoopa Valley Reservation, California, M-36450 (Feb. 5, 1958) 65 I. D. 59

Where lands belonging to the United States are reserved for the use of the United States in carrying out its duties as guardian of the Indians, even though such use is intended to benefit the Indians, the lands are not held in trust for the Indians and are not included in an Indian reservation.

Leasability of Ceded Lands Used by the United States for the Benefit of the Indians, M-36540 (Jan. 8, 1959)

INDIAN TRIBES--Continued

RESERVATIONS--Continued

The statute setting apart the Colorado River Indian Reservation for "the Indians of said river and its tributaries" constitutes a continuing offer to the Indians of the class mentioned and may be accepted by them until withdrawn.

Authority to Lease Unassigned Lands of the Colorado River Indian Reservation, M-36557 (Feb. 24, 1959) 66 I. D. 57

TERMINAL LEGISLATION

The enactment of the act of August 13, 1954 (68 Stat. 712), does not prevent the sale of timber on the Klamath Indian Reservation where the timber sale contract will be completed within the 4-year limitation period fixed by the act and the sale will not interfere with the purposes of the act.

Timber Sales and Tribal Loans, Klamath Reservation, Oregon, M-36257 (Jan. 14, 1955)

Under section 9 of the act of August 13, 1954 (68 Stat. 718), (1) all trust and restricted property of members of the Klamath Tribe who die 6 months or more after the date of the act is subject to the probate jurisdiction of State courts; (2) if the State court orders a sale of such property in order to pay claims and probate expenses, the purchaser whether Indian or non-Indian, takes a fee simple title to the property sold; (3) if the court distributes such property to an Indian heir, such heir acquires the property in a trust or restricted status unless such status has been removed by operation of said act; but if the distributee or devisee is a non-Indian, the trust and restricted status is removed; (4) if the court decides it would be advantageous to cause a trust or restricted allotment to be leased during the period of probate, it must be leased in accordance with Federal rules and regulations; (5) the court, in probating such property, may appoint guardians ad litem to protect the interests of minors, incompetents or persons non compos mentis; (6) where the court orders a sale of such trust or restricted property, the United States is a necessary party to the proceedings therefor, and must be served with the petition for sale and accorded an opportunity to be heard. Service should be made upon the U. S. Attorney and upon the Attorney General of the United States; (7) heirs or devisees of Klamath Indians need

not be qualified by the 1/16th degree Indian blood of the Klamath Tribe as formerly required; (8) trust and restricted estates of Klamath Indians who died prior to February 13, 1955, will be probated by the Federal Examiner of Inheritance and not by a State court.

Under section 15 of the act of August 13, 1954 (68 Stat. 718) (1) the Secretary of the Interior may, where there is an existing guardianship over a Klamath Indian, recognize the guardian and deliver the property of the ward to him; (2) approval of the appointment of such a guardian by the Secretary is not necessary as a matter of law; (3) no impropriety is seen in the appearance of an authorized representative of the Secretary in a guardianship proceeding for the purpose of assisting the court in making a proper appointment; (4) there is nothing in the Oregon statutes that would preclude an authorized representative of the Secretary from filing a guardianship petition or to prevent an Oregon court from appointing a guardian pursuant to such a petition; (5) the Secretary in the absence of a guardianship, may transfer trust and restricted personal property to a minor himself, if the Secretary believes the minor competent to handle the property; or the Secretary may transfer such property to a State or county welfare agency, to a parent as natural guardian, or to a private trustee.

The fishing rights secured to the Klamath Indians by the Treaty of 1864 and reserved under section 14(b) of the act of August 13, 1954 (68 Stat. 718), are: (1) neither alienable nor descendible; (2) may be exercised by a withdrawing member of the tribe until fully paid his share in the tribal assets; (3) may be exercised by an heir of a member only if the heir is also a member; (4) may not be exercised with respect to tribal land which is sold and conveyed in fee simple; and (5) may continue to be exercised by members who elect to remain in the tribe.

The requirement in section 8(b) of the act of August 13, 1954 (68 Stat. 718), that the Secretary of the Interior transfer the sub-surface rights in trust or restricted land owned by members of the Klamath Tribe to one or more trustees becomes applicable at and after the date of the proclamation to be issued pursuant to section 18(a) of that act and does not apply to situations prior thereto.

Loans transferred to the Klamath Tribe pursuant to section 12 of the act of August 13, 1954 (68 Stat. 718), are assets of the tribe and subject to management by the trustee, corporation or other legal entity selected pursuant to section 5(a)(5) of the act.

Section 14(a) of the act of August 13, 1954 (68 Stat. 718), defers the application of the laws of Oregon with respect to the abandonment of

water rights by the Klamath Tribe or its members for a period of 15 years after the date of the proclamation issued pursuant to section 18 of that act. Except for such deferment, section 14(a) is merely a saving clause which operates to preserve whatever water rights the tribe and its members may have under the law in force on the date of the act.

Under the provisions of section 5(a)(2) of the act of August 13, 1954 (68 Stat. 718), which allows "each adult member of the /Klamath/ tribe * * * an opportunity to elect for himself, and, in the case of a head of a family, for the members of the family who are minors" to withdraw from or remain in the tribe: (1) when the parents of a child are separated and the child is living with one of the parents, the latter parent may make the decision for the child to withdraw; (2) when the parents of a child are separated and the child is living with some third person, the question of who is the head of the minor's family is one of fact which must be considered in each case; (3) where the child has a judicially appointed guardian of his person and his property, the guardian may not elect for the child unless the guardian is otherwise qualified as an adult member and head of the family of the minor; (4) if the child is an orphan who is living in an institution where he cannot be considered as a member of the family of an adult Klamath Indian, no one may make the decision for him to withdraw; (5) an adult member of the tribe who has judicially been deprived of control over his child may not make an election for his child to withdraw; (6) a parent who is judicially declared to be non compos mentis may not elect for himself or his child to withdraw; and (7) an adult member who is the head of a family may make the decision to withdraw for his wife if she is under, but not if she is over, 21 years of age.

The question of whether a member of the Klamath Tribe may alienate his interest in tribal property after the transfer of such property pursuant to section 6(a) of the act of August 13, 1954 (68 Stat. 718), and prior to the date of the proclamation to be issued pursuant to section 18 of said act, is a question to which no definite answer can be given at this time, as such answer will depend upon the terms of the plan pursuant to which title to such property is transferred.

The Klamath Tribe will continue to exist subsequent to the date of the proclamation issued under section 18 of the act of August 13, 1954 (68 Stat. 718), and will continue as such for the purpose of exercising such rights and privileges as are reserved to it by that act.

Since section 2(e) of the act of August 13, 1954 (68 Stat. 718), defines "adult" for the purposes of that act as "a member of the tribe who has attained the age of twenty-one years,"

married women or emancipated minors under the age of 21 may not be considered adults for the purposes of that act even though they may be "adults" under State law.

An adult member of the Klamath Tribe, if incompetent, insane or non compos mentis may not, under section 5(a)(2) of the act of August 13, 1954 (68 Stat. 718), make an election to withdraw from the tribe.

The right of members of the Klamath Tribe to free-use grazing on tribal land will not terminate upon publication, under the act of August 13, 1954 (68 Stat. 718), of the final membership roll. The right to so use tribal land will continue until tribal title is extinguished by sale, or by transfer pursuant to section 6(a) of that act, in which latter event the use of the range will be governed by the terms of the plan pursuant to which such transfer is made.

When pursuant to section 5(a)(3) of the act of August 13, 1954 (68 Stat. 718), the selection is made of all that property of the Klamath Tribe which is to be sold to pay off withdrawing members, a partition of the tribal property results. Thereafter withdrawing members will be entitled to receive all the income from the property so selected, but will not receive per capita payments from the remaining tribal property.

Members of the Klamath Tribe who elect to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), remain tribal members and may participate in tribal affairs to the same extent as any member until they have been paid in full the money value of their interests in tribal property.

Should a member of the Klamath Tribe, who has elected to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), inherit an interest of a member who has elected to remain in the tribe, the withdrawing member would not acquire by such inheritance the decedent's right to vote as a member of the tribe.

It will be advisable for a member of the Klamath Tribe, who elects to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), at the time of his election and as a part of that election, to petition the Secretary of the Interior to issue to him, pursuant to section 8 of the act, a patent in fee for any trust lands, or to remove restrictions covering any restricted lands he might now or hereafter hold.

The right of members of the Klamath Tribe to hunt and fish on tribal lands does not, for purposes of the appraisal to be made under section 5(a)(1) of the act of August 13, 1954

(68 Stat. 718), have an appraisable value, as this right comes to an end when membership ceases, and is not subject to transfer.

A judicially appointed guardian for an adult member of the Klamath Tribe who is insane, incompetent or non compos mentis may not, under the provisions of section 5(a)(2) of the act of August 13, 1954 (68 Stat. 718), make an election for him to withdraw from the tribe.

Since section 6(b) of the act of August 13, 1954 (68 Stat. 718), provides that "all of the actions required by sections 5 and 6 of this act shall be completed at the earliest practicable time and in no event later than four years from the date of this Act," sales of land pursuant to section 5 of the act may not be made subsequent to August 13, 1958.

Under section 16 of the act of August 13, 1954 (68 Stat. 718), per capita payments may be made from the capital reserve fund of the Klamath Tribe established by 50 Stat. 872.

The term "subsurface rights" as used in section 8 (b) of the act of August 13, 1954 (68 Stat. 718), does not include water rights.

Klamath Terminal Legislation, M-36284
(May 20, 1955) 62 I. D. 186

The requirement of the act of June 15, 1934 (48 Stat. 964), that a member of the Menominee Tribe be living on the last day of the fiscal year in order that his estate share in a per capita payment out of stumpage earned during that fiscal year, has been repealed by section 3 of the act of June 17, 1954 (68 Stat. 250), with respect to per capitas payable from stumpage earned during a fiscal year ending on a date subsequent to June 17, 1954, since the 1954 act vested in each member on the final roll an individual, undivided share in the property of the Tribe.

Menominee Per Capita Payments, M-36288
(June 23, 1955)

The positions of Indians subject to section 23 of the act of August 27, 1954, who are presently employed by the Bureau of Indian Affairs will remain in the excepted category in which they have been placed by the Civil Service Commission so long as the Commission's regulations remain unchanged.

INDIAN TRIBES--Continued

TERMINAL LEGISLATION--Continued

Upon the issuance of a proclamation, Indians who are subject to section 23 of the act of August 27, 1954 (68 Stat. 868, 877), will not be entitled to preferment in employment by the Bureau of Indian Affairs.

Indian Preference in Employment, M-36297 (Aug. 24, 1955)

The determination of the full-blood membership of the Ute Tribe of the Uintah and Ouray Reservation in Utah for the purpose of participating in the development program provided for in section 24 of the act of August 27, 1954 (68 Stat. 868; 25 U.S.C. sec. 677), is controlled by the provisions of the act and not by the constitution and bylaws of the Ute Indian Tribe.

Determination of Full-Blood Membership of Ute Tribe for Purpose of Participation in Development Program Provided for in act of August 27, 1954, M-36304 (Sept. 6, 1955)

The Secretary is without authority to approve a transfer of a minor from the full-blood roll to the mixed-blood roll under section 4 of the act of August 27, 1954 (68 Stat. 868).

Transfer of Minor Full-Bloods to the Mixed-Blood Roll Under Section 4 of the act of August 27, 1954 (68 Stat. 868), M-36305 (Sept. 21, 1955)

A lease for the mining of diatomaceous earth on tribal lands of the Klamath Reservation in Oregon may be made for a period extending beyond the date fixed by Congress for the termination of Federal supervision and control only where it is clear that such a lease will not prevent or delay the termination of Federal trustee responsibilities.

Although the approval of the Management Specialists retained under the Klamath Termination Act of such a lease /see title/ is not essential to its validity, the manifold duties imposed upon them by the act require that they be consulted, and that their advice be obtained before any such lease is executed or approved.

Lease of Klamath Tribal Land Which Extends Beyond the Date Fixed by Congress for the Termination of Federal Supervision and Control, M-36307 (Nov. 17, 1955)

INDIAN TRIBES--Continued

TERMINAL LEGISLATION--Continued

Section 20 of the Klamath Termination Act (P.L. 587, 68 Stat. 723; 25 U.S.C. sec. 564u) accelerates and assures repayment of loans made from the Klamath Revolving fund by authorizing the Secretary to apply any funds payable to a withdrawing member of the tribe, as a set off against any indebtedness payable to the tribe or to the United States, in whatever amount is required to liquidate such debt although according to the terms of the loan contract the entire debt is then neither due nor in default.

Interpretation of Sections 20 and 22 of Klamath Termination Act as Applied to the Tribal Indebtedness of Withdrawing Members, M-36337 (Mar. 26, 1956)

The act of August 27, 1954 (68 Stat. 868, 25 U.S.C. secs. 677-677aa), provides for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members in preparation for termination of Federal supervision over their properties. 25 U.S.C. sec. 677g provides for a roll of the full-blood members of the tribe, living on August 27, 1954, which roll shall be final for the purposes of the act. Nothing in the act makes the interest of a full-blood member inheritable or devisable. Since no persons born after the date of the act can qualify as full-blood members for inclusion on the final roll, subsequently born full-blood children have no rights to the assets of the tribe except such rights as may be extended to them under the development program called for by section 24 of the act (25 U.S.C. sec. 677w).

Inheritable Status of Interest of Full-Blood Member of the Ute Indian Tribe of Utah Under the Act of August 27, 1954 (68 Stat. 868, 25 U.S.C. Secs. 677-677aa), M-36339 (Mar. 28, 1956)

The basic authority for the Secretary of the Interior to sell timber on Indian reservations is set forth in section 7 of the act of June 25, 1910 (36 Stat. 857; 25 U.S.C. sec. 407). Sale of timber on the Klamath Reservation will continue to be governed by the regulations implementing the act of June 25, 1910, until such time as tribal title is extinguished by sale or the tribal property is conveyed to a trustee, corporation or other legal entity in accordance with a plan to be prepared by management specialists pursuant to the Klamath terminal legislation (the act of August 13, 1954, 68 Stat. 718; 25 U.S.C. sec. 564).

Authority for Continued Approval of Timber Sales on Klamath Reservation, M-36338 (May 29, 1956) 63 I.D. 147

INDIAN TRIBES--Continued

TERMINAL LEGISLATION--Continued

The rights of persons and concerns having leases, rights-of-way, permits, licenses, liens or other contracts encumbering real property to be disposed of pursuant to terminal legislation are not affected by such legislation (citing section 22 of the Klamath Termination Act (68 Stat. 723; 25 U.S.C. sec. 564u).

The Secretary is authorized to grant leases, permits, licenses, rights-of-way, liens and other contracts encumbering real property to be disposed of pursuant to terminal legislation, after the date of enactment of such legislation and until the effective date of termination of Federal responsibility. Such encumbrance may even extend beyond the final date of termination of responsibility, but in all such cases the written consent of all persons in interest should be obtained.

Provisions in terminal legislation (see section 22, Klamath termination legislation, 68 Stat. 723; 25 U.S.C. sec. 564u) empowering the Secretary of the Interior to transfer "powers, duties or other functions with respect to the property subject to" leases, rights-of-way or other contracts encumbering land to be disposed of, is not mandatory. Whether the Secretary extinguishes them, retains them, or transfers them as therein provided, is a matter of administrative nature, involving governmental policy.

The Secretary's authority to revoke a permit for a right-of-way is not arbitrary. He cannot employ this power solely to facilitate termination legislation.

Notation of an encumbrance on a fee patent for tribal or allotted land issued pursuant to terminal legislation is within the Secretary of the Interior's authority and is administratively desirable.

Effect of Terminal Legislation Upon Revocable Rights-of-Way and Other Real Property Encumbrances on Indian Lands, M-36369 (Sept. 17, 1956)

Where, pursuant to statute, Indians are given an opportunity to make a choice whether to remain as members of a tribe or to withdraw from such membership on the basis of a plan presented to the Indians, it will be presumed that the Indians, in making their choice, relied on the plan as presented. Any subsequent substantial change in the basic plan would require that the Indians affected be given again an opportunity to choose between withdrawing or remaining. A construction of the statute which avoids

INDIAN TRIBES--Continued

TERMINAL LEGISLATION--Continued

the necessity of such reconsideration by the Indians of their choice is preferable to one which would necessitate a new election.

Scope of Secretarial Designation of the Klamath Marsh, M-36536 (Oct. 28, 1958)

Section 15 of the Klamath Termination Act requiring Secretary of the Interior to protect minors and other members of the tribe needing assistance by establishing guardianships, trusts, annuities, "or other means deemed adequate," authorizes the Secretary to enter into trust agreement empowering the trustee to invest and dispose of trust estate so as to produce sufficient income and protect principal during noncompetency, and to determine when noncompetency ceases.

Klamath Termination Trust Agreements, M-36544 (Dec. 16, 1958)

TREATIES

The Indian title to the unallotted lands on the Tulalip Indian Reservation in the State of Washington, which reservation was set aside pursuant to a treaty concluded in 1855 between the United States and a large number of tribes or bands located west of the Cascade Mountains, is now vested in the Indians located on the reservation who organized and incorporated pursuant to the provisions of the Indian Reorganization Act of 1934 under the corporate name of "The Tulalip Tribes of the Tulalip Reservation."

Where a large number of Indian tribes or bands enter into a treaty with the United States which has for its purpose the consolidation on the reservation of those individual members of the several tribes or bands who desire to take advantage of the privilege of settling on the reservation and of taking allotments there, the treaty does not constitute a grant in praesenti of the title to the reservation land to the treaty tribes or bands as entities.

Under such a treaty the privilege of removing to and enjoying the benefits of the reservation is extended to those members of the several tribes and bands who elect to remove to and settle upon the reservation, whereupon they become invested with the full incidents of Indian title.

Ownership of Unallotted Lands on the Tulalip Indian Reservation in the State of Washington, M-36181 (Feb. 21, 1956)

INDIAN TRIBES--Continued

TREATIES--Continued

Solicitor's Opinion of June 15, 1934, 54 I. D. 517, is overruled insofar as it suggests that the hunting rights on Indian reservations were not protected for the future by the Treaty of Point Elliott, 1855, or that, despite any such protection, such rights were plainly abrogated by the Migratory Bird Treaty Act, 39 Stat. 1702.

Imposition of North Dakota State Fish and Game Laws on Indians Claiming Treaty and Other Rights to Hunt and Fish, M-36410 (Feb. 11, 1957)

TRIBAL GOVERNMENT

Should a member of the Klamath Tribe, who has elected to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), inherit an interest of a member who has elected to remain in the tribe, the withdrawing member would not acquire by such inheritance the decedent's right to vote as a member of the tribe.

Members of the Klamath Tribe who elect to withdraw from the tribe pursuant to the act of August 13, 1954 (68 Stat. 718), remain tribal members and may participate in tribal affairs to the same extent as any member until they have been paid in full the money value of their interests in tribal property.

Klamath Terminal Legislation, M-36284 (May 20, 1955) 62 I. D. 186

An order issued by the Oglala Sioux Tribal Court of the Oglala Sioux Tribe at Pine Ridge Reservation, pertaining to the custody of a minor Indian child, does not prevail over a custody order of the Juvenile Court of the City and County of Denver, Colorado, where the child was neglected within the jurisdictional limits of the juvenile court.

Jurisdiction of Tribal Court and Colorado Juvenile Court for Determination of Custody of Dependent and Neglected Indian Child, M-36316 (Dec. 1 1955) 62 I. D. 466

Where it is desirable to reduce to writing existing constitutions or rewrite in substantially new and changed form the constitution and bylaws of an Indian tribe or association not incorporated under section 16 of the Indian Reorganization Act, under the provisions of Departmental

INDIAN TRIBES--Continued

TRIBAL GOVERNMENT--Continued

Circular 3160, dated May 5, 1936, such proposed constitution and bylaws shall be forwarded to Washington for approval, and, if approved, be sent back for ratification by the qualified voters of the tribe (those listed on the census rolls) for referendum by secret ballot.

Where the constitution and bylaws of an Indian tribe or other Indian association makes no provision for removing officers or members of their governing body, the General Council has the authority to remove officers and Executive Board members at its discretion. The General Council is made up of all members of the organization eligible to participate and as such can determine the desirability of continuing persons in office unless limited by their constitution and bylaws.

Where actions have been taken by an Indian General Council or Executive Board of a group not incorporated under the provisions of section 16 of the Indian Reorganization Act in substantial compliance with the provisions of a constitution or bylaws, such actions will be liberally construed to find compliance and will not be rejected for failure to give that strict compliance as would be expected of a non-Indian group such as a business corporation or State political unit. However, at least a minimum of compliance must be found so as to indicate a sincere effort on the part of the Indian group to comply with the intent of the document as interpreted in the light of the Indian practices and customs of the group involved.

Fort Peck Tribal Affairs, M-36342 (Apr. 23, 1956)

Where a meeting of a General Council of the combined tribes on a reservation is called without compliance with the provisions of the organizational constitution and where there is no well recognized and binding custom or practice among the Indian tribes involved permitting the calling of General Council meetings in the manner attempted, the Department of the Interior will not recognize the authority of the meeting.

Where the offices on a tribal Executive Board become vacant, the Board may appoint temporary officers from its members to fill such vacancies and official actions requiring signatures can be handled by resolutions specifically authorizing signatures by designated temporary officers for or on behalf of the Executive Board.

Fort Peck Tribal Affairs, M-36344 (May 1, 1956)

INDIAN TRIBES--Continued

TRIBAL GOVERNMENT--Continued

The Klamath Indian Tribe has authority to hire, and pay from tribal funds, special "game wardens" or "police officers" to enforce tribal regulations and protect tribal rights in connection with hunting and fishing on the Klamath Reservation. The hunting and trapping laws of the State of Oregon have not been extended to the Klamath Reservation by the act of August 15, 1953, as amended (67 Stat. 588; 18 U.S.C. sec. 1162). Until formal termination of the Federal trust relationship to the affairs of the Tribe pursuant to the act of August 13, 1954 (68 Stat. 718, 25 U.S.C. sec. 564, etc.), the authority of the Klamath Tribal Council and Executive Committee with respect to hunting, trapping or fishing or the control, licensing, or regulation thereof continues substantially as at present.

Hunting and Fishing Rights of the Klamath Indian Tribe - Authority to Hire Game Wardens, M-36358 (July 26, 1956)

An ordinance requiring all Indian owners of livestock who desire to remove their livestock from the Fort Hall Reservation to obtain a permit is a valid exercise of the powers enumerated in the tribal constitution. Such ordinance does not contravene the act of August 15, 1953 (67 Stat. 590; 18 U.S.C. sec. 1157).

Attempted Ordinance by Fort Hall Business Council re Permits for Sale of Livestock and Branding, M-36363 (Aug. 24, 1956)

An Indian tribe having voted its preference to have a "dry reservation" under the local option clause of the act of August 15, 1953 (67 Stat. 586), has not necessarily committed itself irrevocably, but may later suspend the application of the Federal Indian liquor laws by duly adopted ordinance certified by the Secretary of the Interior and published in the Federal Register.

Interpretation of "Local Option" Clause of Repeal of Indian Liquor Law Act of August 15, 1953 (67 Stat. 586), M-36447 (Nov. 6, 1957)

Where an Indian tribal constitution provides for a hereditary chief system of government, a tribal council chosen by the hereditary chiefs is the only group which can be recognized as the legitimate tribal government.

The Tribal Government of the Red Lake Band of Chippewa Indians, M-36473 (Nov. 22, 1957)

INDIAN TRIBES--Continued

TRIBAL GOVERNMENT--Continued

Nothing in the Executive Order of October 16, 1891, indicates an intent to confer upon the Klamath River Indians an interest in the realty of the original Hoopa Valley Reservation. Despite the enlargement of the original Hoopa Valley Reservation, the Klamath River Tribe was never merged with nor absorbed into the Hoopa Valley Tribe. Therefore, the fact that the Hoopa Valley Tribe limited the scope of its jurisdiction under its 1949 constitution does the Klamath River Indians no injustice. As an independent tribal group, neither the Klamath River Indians nor their successors, the Yuroks, have any property right in the original 12-mile square.

The Commissioner of Indian Affairs has been correct, as a matter of law, in recognizing tribal title to the communal lands of the 12-mile square Executive order reservation in the Hoopa Valley Tribe. The Commissioner has been further correct in paying out per capita payments as authorized generally by the act of March 2, 1907 (34 Stat. 1221), to enrolled members of the Hoopa Valley Tribe only.

Rights of Indians in the Hoopa Valley Reservation, California, M-36450 (Feb. 5, 1958) 65 I. D. 59

The governing body of the Three Affiliated Tribes on the Fort Berthold Reservation acted within the scope of the traditional authority of Indian tribes to tax persons under their jurisdiction and to exercise such other reasonable governmental powers as are necessary to maintain law and order and to provide traditional governmental services except in so far as such functions have been assumed by the paramount government, the United States, when, by Resolution dated March 11, 1948, the Tribal Business Council imposed a sales tax on the gross sales on all cattle and horses sold on or off the reservation, and on sales of crops produced as a result of revolving credit financing.

Sales Tax, Three Affiliated Tribes of the Fort Berthold Reservation, M-36448 (Mar. 3, 1958)

Powers of a tribe organized under section 476 of Title 25 U. S. C. are so broad that where a power is vested in any Indian tribe or its tribal council by existing law, in accordance with such law, and are not spelled out in the constitution or are not voluntarily relinquished or modified, such power can be read into the constitution.

Timber as a Capital Asset of the Blackfeet Tribe, M-36545 (Dec. 16, 1958)

TRIBAL GOVERNMENT--Continued

When an Indian tribe, acting in General Council, ratifies and approves the prior execution of an attorney contract by a Tribal Executive Board, the action of the General Council transcends that of the Executive Board and it becomes immaterial whether a quorum was in attendance at the meeting of the said Executive Board.

Where the tribes concerned, acting in General Council, take action at a meeting of which wide notice had been given, and where the meeting freely permitted discussion of business presented and appeared to be otherwise proper, the approval of an attorneys' contract which had the sanction of such a meeting will be affirmed on appeal.

Fort Peck General Counsel Contract, IA-1042 (May 25, 1959)

TRIBAL PERSONALTY

Generally

Where there is a question as to whether tribal resources, such as timber or lands, are held as an asset of the tribal municipal corporation, organized under section 16 of the Indian Reorganization Act (25 U. S. C., 1952 ed., sec. 476) or as an asset of the tribal business corporation organized under section 17 of said act (25 U. S. C., 1952 ed., sec. 477), ownership by the tribe rather than by the business corporation will be presumed in the absence of a clear showing to the contrary.

Timber as a Capital Asset of the Blackfeet Tribe, M-36545 (Dec. 16, 1958)

Acquisition

Loans transferred to the Klamath Tribe pursuant to section 12 of the act of August 13, 1954 (68 Stat. 718), are assets of the tribe and subject to management by the trustee, corporation or other legal entity selected pursuant to section 5(a)(5) of the act.

Klamath Terminal Legislation, M-36284 (May 20, 1955) 62 I. D. 186

TRIBAL PERSONALTY--Continued

Alienation

There appears to be no clear-cut authority for the general council of the Seminole Tribe of Oklahoma to act independently, on behalf of the tribe, in matters involving the pledging of tribal assets as security for a loan to the tribe. To bind the tribe in such matters, the general council must act in conjunction with the Principal Chief.

Authority of Seminole Tribe of Oklahoma to Borrow Money and Pledge Assets as Security for Loan From Revolving Fund, M-36482 (Oct. 29, 1957)

Tribal Funds

Permissive authority continues under section 12 of the act (act of August 13, 1954, 68 Stat. 712) to make loans from tribal funds pursuant to the acts of August 28, 1937, and August 7, 1939.

Timber Sales and Tribal Loans, Klamath Reservation, Oregon, M-36257 (Jan. 14, 1955)

Loans from the Klamath revolving loan fund made pursuant to the act of August 28, 1937 (50 Stat. 872), are enforceable in the State courts of Oregon regardless of the fact that the rate of interest and a penalty for overdue payment as prescribed by regulations exceed the maximum allowable by Oregon statute. The act which gives certain states jurisdiction over controversies involving Indians expressly excepts the operation of State law over Federal trust or restricted Indian property when inconsistent with any Federal treaty, agreement or statute or with any regulation made pursuant thereto. (18 U.S.C. sec. 1162(b), 1952 ed., Supp. I, 67 Stat. 586.) The Klamath revolving loan fund is an authorized use of tribal property held in trust by the United States.

Regulations for Repayment of Loans from Klamath Tribal Loan Fund, M-36326 (Jan. 19, 1956)

INDIANS

GENERALLY

The inspection provisions of Title II of the Federal Coal Mine Safety Act apply to Indian-operated mines on Indian lands.

An intent to exclude Indians from a general act of Congress must be definitely expressed.

Application of the Mine Inspection Provisions of Title II of the Federal Coal Mine Safety Act to Mines on Indian Lands, M-36312 (Oct. 21, 1955)

The payment of $2,250,000 provided for in section 11 of the act may not be increased or decreased without further legislation by the Congress.

Expenses incurred by the Tribal Council on and after the date of the Secretarial proclamation declaring the act of September 3, 1954, to be in effect are not reimbursable by the United States.

Interpretation of the Cheyenne River Act of September 3, 1954 (68 Stat. 1191), M-36323 (Jan. 12, 1956) 63 I. D. 7

The Department's schedule of fees for attorneys who represent litigants in Osage probate matters is not applicable to the allowance of compensation to a guardian ad litem appointed under the provisions of 25 CFR 83.5, such compensation being fixed by the Superintendent of the Osage Indian Agency on a quantum meruit basis.

Estate of Charles McDougan, Sr., IA-593 (Feb. 20, 1956)

Estate of Charles McDougan, Jr., IA-743 (Mar. 12, 1956)

Since all of the original claimants had been identified prior to the enactment of the act of June 30, 1945, and were in the position of having had claims filed for them, and since the overwhelming majority of the original claimants were deceased at the time of the enactment, the statutory bar, as a practical matter operates against heirs and devisees who had not been identified so as to put them in the position of filing a claim or making a demand on or before June 30, 1955.

GENERALLY--Continued

Under section 3 of the act of June 30, 1945 (59 Stat. 265), claims or demands by individual Sioux Indians against the United States for personal property losses are barred unless a claim or demand was filed with the Office of Indian Affairs on or before June 30, 1955.

Statutory Time Limit on Payment of Claims Under Act of June 30, 1945 (59 Stat. 265), M-36333 (Mar. 6, 1956)

Indian occupancy of public lands is entitled to be protected against adverse disposition of the lands, whether or not the Indian occupants are privileged to obtain title to the lands occupied and regardless of whether such lands are mineral or non-mineral.

Availability of Lands for Oil and Gas Leasing--Boundaries of the Fort Peck Indian Reservation, M-36539 (Nov. 19, 1958)

Where lands belonging to the United States are reserved for the use of the United States in carrying out its duties as guardian of the Indians, even though such use is intended to benefit the Indians, the lands are not held in trust for the Indians and are not included in an Indian reservation.

Leasability of Ceded Lands Used by the United States for the Benefit of the Indians, M-36540 (Jan. 8, 1959)

CIVIL JURISDICTION

An order issued by the Oglala Sioux Tribal Court of the Oglala Sioux Tribe at Pine Ridge Reservation, pertaining to the custody of a minor Indian child, does not prevail over a custody order of the Juvenile Court of the City and County of Denver, Colorado, where the child was neglected within the jurisdictional limits of the juvenile court.

Jurisdiction of Tribal Court and Colorado Juvenile Court for Determination of Custody of Dependent and Neglected Indian Child, M-36316 (Dec. 1, 1955) 62 I. D. 466

The Arapahoe Tribe may bring action in State courts whenever necessary to protect the interests of the tribe in tribal loans.

Foreclosure of Mortgages Given to Secure Loans Made by the Arapahoe Tribe, M-36341 (Aug. 15, 1956)

INDIANS--Continued

COMPETENCY

A decision not to issue a patent in fee for a restricted interest in allotted lands upon an Indian's application will not be disturbed upon appeal where there has been a failure to establish that the Indian applicant possesses the necessary ability or competency to manage his property affairs for his best interests.

Application of Clarence Longtree for a Patent in Fee, IA-854 (May 28, 1957)

A decision not to issue a patent in fee for restricted allotted lands upon an Indian's application will not be disturbed on appeal where the record supports the conclusion that the applicant is incapable of managing her own affairs.

Application of Adelia Stricker for a Patent in Fee, IA-930 (Aug. 12, 1958)

A decision not to issue a patent in fee for restricted allotted lands upon an Indian's application will not be disturbed on appeal where the record supports the conclusion that the applicant is incapable of managing his own affairs.

Application of William Big Horse for a Patent in Fee, IA-990 (Dec. 15, 1958)

CONTRACTS

An attorney contract with an Indian tribe or group may not be terminated except as provided by the terms of the contract and applicable Federal law.

James C. Peacock, IA-151 (Jan. 6, 1955)

Where a contract for the sale of Indian timber, pursuant to either sections 7 or 8 of the act of June 25, 1910 (36 Stat. 857; 25 U.S.C. secs. 406 or 407), is supported by adequate consideration, no new consideration is required to support a change in price or ratio pursuant to a redetermination of price or ratio clause contained in the contract. Consideration adequate for the original contract is sufficient to support several distinct stipulations by either party to do, or refrain from doing, further acts.

CONTRACTS--Continued

Where a contract for the sale of Indian timber authorizes the Secretary to redetermine stumpage prices upon a finding of changed conditions, the Secretary has broad discretion to consider those factors and use those tests and methods of valuation which a capable and prudent businessman would use.

Contracts for the sale of timber on any Indian allotment or on unallotted tribal lands pursuant to sections 7 and 8 of the act of June 25, 1910 (36 Stat. 857; 25 U.S.C. secs. 406 and 407), are not public contracts so as to be subject to all the special laws pertaining to such contracts.

Construction of a Contract for the Sale of Indian Timber, M-36461 (July 22, 1957) 64 I. D. 305

Agreements by Indian lessors and their lessees, made independently of approved leasing arrangements of trust or restricted Indian lands and purporting either to assure the lessees' tenure beyond the term of approved leases or to require the payment by the Indian lessors for any improvements by the lessees, are inoperative as affecting the trust or restricted property of the Indians for leasing purposes or otherwise without approval as required by law.

Validity of Unapproved Side Agreements Between Indians and Lessees of Restricted Lands, M-36549 (Feb. 3, 1959)

CRIMINAL JURISDICTION

Jurisdiction over offenses including trespass committed by or against Indians on the Klamath Reservation in the State of Oregon and actions for damages sounding in tort in that connection are within the jurisdiction of the legislature and courts of the State of Oregon by virtue of the act of August 15, 1953 (67 Stat. 588; 18 U.S.C. sec. 1162). The act does not give the State jurisdiction to tax or otherwise affect the Federal trust status of any real or personal property belonging to individual Indians or the Indian tribes in Oregon. Neither does it bestow a power to regulate the use of such property in a manner inconsistent with any Federal treaty, agreement or statute governing Indian property. The privileges and rights enjoyed by Indians with regard to hunting, trapping or fishing are likewise not affected by this act of August 15, 1953. With these limitations, the State of Oregon has the same jurisdiction with regard to criminal matters on the Klamath Reservation that it has over any other land in Oregon.

State Jurisdiction over Criminal Trespass Actions on Klamath Indian Reservation, M-36362 (Aug. 13, 1956) 63 I. D. 253

INDIANS--Continued

DOMESTIC RELATIONS

Where the claim of a putative father to inherit from his illegitimate Indian son cannot be upheld under the laws of the State governing the devolution of the estate, the act of February 28, 1891 (25 Stat. 795, 25 U.S.C., 1952 ed., sec. 371), is of no assistance since it does not create any rights in the father to inherit from his illegitimate issue.

Estate of John Slickpoo, IA-130 (Feb. 28, 1955)

Under the provisions of section 5(a)(2) of the act of August 13, 1954 (68 Stat. 718), which allows "each adult member of the /Klamath/ tribe * * * an opportunity to elect for himself, and, in the case of a head of a family, for the members of the family who are minors" to withdraw from or remain in the tribe: (1) when the parents of a child are separated and the child is living with one of the parents, the latter parent may make the decision for the child to withdraw; (2) when the parents of a child are separated and the child is living with some third person, the question of who is the head of the minor's family is one of fact which must be considered in each case; (3) where the child has a judicially appointed guardian of his person and his property, the guardian may not elect for the child unless the guardian is otherwise qualified as an adult member and head of the family of the minor; (4) if the child is an orphan who is living in an institution where he cannot be considered as a member of the family of an adult Klamath Indian, no one may make the decision for him to withdraw; (5) an adult member of the tribe who has judicially been deprived of control over his child may not make an election for his child to withdraw; (6) a parent who is judicially declared to be non compos mentis may not elect for himself or his child to withdraw; and (7) an adult member who is the head of a family may make the decision to withdraw for his wife if she is under, but not if she is over, 21 years of age.

Under section 15 of the act of August 13, 1954 (68 Stat. 718) (1) the Secretary of the Interior may, where there is an existing guardianship over a Klamath Indian, recognize the guardian and deliver the property of the ward to him; (2) approval of the appointment of such a guardian by the Secretary is not necessary as a matter of law; (3) no impropriety is seen in the appearance of an authorized representative of the Secretary in a guardianship proceeding for the purpose of assisting the court in making a proper appointment; (4) there is nothing in the Oregon statutes that would preclude an authorized representative of the Secretary from filing a guardianship petition or to prevent an Oregon court from appointing a guardian pursuant to such a petition; (5) the Secretary in the absence of a guardianship, may transfer trust and restricted personal property to a minor himself, if the Secretary believes the minor competent to

INDIANS--Continued

DOMESTIC RELATIONS--Continued

handle the property; or the Secretary may transfer such property to a State or county welfare agency, to a parent as natural guardian, or to a private trustee.

Klamath Terminal Legislation, M-36284 (May 20, 1955) 62 I.D. 186

In probating the restricted estate of an Indian dying after the effective date of the act of July 8, 1940 (54 Stat. 746, 25 U.S.C., 1952 ed., sec. 372a), no person can be recognized as the adopted child of such decedent unless such adoption was validated as required by that act.

Estate of Jeanette Ezekial, Deceased Nez Perce Allottee No. 1432, IA-643 (May 17, 1956)

Where the proof in an Indian probate proceeding indicates that there have been successive marriages and divorces by Indian custom between an Indian woman and her husbands, the record warrants a finding that the Indian decedent died unmarried and single and her heirs should be determined on that basis.

A divorce by Indian custom may be accomplished unilaterally by either of the parties to the marriage, irrespective of the fact that one of the parties to the marital relation is of non-Indian blood. A separation, plus an intention on the part of at least one of the parties that the separation shall be permanent, is sufficient to dissolve the ties of either a ceremonial or an Indian custom marriage.

Estate of Jeanette Scott Edland, Unallotted Nez Perce Indian, IA-107 (May 17, 1956) 63 I.D. 141

A divorce by Indian custom may be accomplished unilaterally by either of the parties to a marriage. Thus, a separation, plus an intention on the part of at least one of the parties to the relation that the separation shall be permanent, is sufficient to dissolve the ties of either a ceremonial or an Indian custom marriage.

Estate of Effie Evelyn Whitfield Derrick, Unallotted Nez Perce Indian, IA-696 (Jan. 2, 1957)

A divorce by Indian custom is accomplished by the actual separation of the parties, their permanently living apart, and the assumption

INDIANS--Continued

DOMESTIC RELATIONS--Continued

thereafter of marital relations by one of them with another person. This result follows although one of the parties to the terminated marriage relation is of non-Indian blood, and irrespective of the form of such marriage.

Absent tribal action prescribing formal procedures to be followed to effect a valid Indian custom marriage, proof of such a marriage can be based upon the actions of the parties themselves, their intent, and the manner in which their associations together were regarded by others.

Estate of Adeline Stamill Goudy, Unallotted Yakima Indian, IA-517 (Feb. 11, 1957)

In probating the restricted estate of a deceased Indian of the Crow Tribe of Indians of Montana, no person can be recognized as the adopted heir of such decedent under the act of March 3, 1931 (46 Stat. 1494), unless the adoption was approved in the manner provided by that act. The initiation of certain action to obtain the required approval of the Superintendent is ineffective where such approval was not given, and, therefore, a status as an adopted heir of the decedent is not achieved.

Estate of Walks With a Wolf, Deceased Crow Allottee No. 137, IA-254 (Feb. 21, 1958) 65 I. D. 92

A father being primarily responsible is expected, if able, to provide for the care and support of his minor child.

Estate of Frederick Kills First, Deceased Cheyenne River Allottee No. 5128, IA-875 (Nov. 21, 1958)

HUNTING AND FISHING

The fishing rights secured to the Klamath Indians by the Treaty of 1864 and reserved under section 14(b) of the act of August 13, 1954 (68 Stat. 718), are: (1) neither alienable nor descendible; (2) may be exercised by a withdrawing member of the tribe until fully paid his share in the tribal assets; (3) may be exercised by an heir of a member only if the heir is also a member; (4) may not be exercised with respect to tribal land which is sold and conveyed in fee simple; and (5) may continue to be exercised by members who elect to remain in the tribe.

INDIANS--Continued

HUNTING AND FISHING--Continued

The right of members of the Klamath Tribe to hunt and fish on tribal lands does not, for purposes of the appraisal to be made under section 5(a)(1) of the act of August 13, 1954 (68 Stat. 718), have an appraisable value, as this right comes to an end when membership ceases, and is not subject to transfer.

Klamath Terminal Legislation, M-36284 (May 20, 1955) 62 I. D. 186

The Klamath Indian Tribe has authority to hire, and pay from tribal funds, special "game wardens" or "police officers" to enforce tribal regulations and protect tribal rights in connection with hunting and fishing on the Klamath Reservation. The hunting and trapping laws of the State of Oregon have not been extended to the Klamath Reservation by the act of August 15, 1953, as amended (67 Stat. 588; 18 U.S.C. sec. 1162). Until formal termination of the Federal trust relationship to the affairs of the Tribe pursuant to the act of August 13, 1954 (68 Stat. 718; 25 U.S.C. sec. 564, etc.), the authority of the Klamath Tribal Council and Executive Committee with respect to hunting, trapping or fishing or the control, licensing, or regulation thereof continues substantially as at present.

Hunting and Fishing Rights of the Klamath Indian Tribe - Authority to Hire Game Wardens, M-36358 (July 26, 1956)

Jurisdiction over offenses including trespass committed by or against Indians on the Klamath Reservation in the State of Oregon and actions for damages sounding in tort in that connection are within the jurisdiction of the legislature and courts of the State of Oregon by virtue of the act of August 15, 1953 (67 Stat. 588; 18 U.S.C. sec. 1162). The act does not give the State jurisdiction to tax or otherwise affect the Federal trust status of any real or personal property belonging to individual Indians or the Indian tribes in Oregon. Neither does it bestow a power to regulate the use of such property in a manner inconsistent with any Federal treaty, agreement or statute governing Indian property. The privileges and rights enjoyed by Indians with regard to hunting, trapping or fishing are likewise not affected by this act of August 15, 1953. With these limitations, the State of Oregon has the same jurisdiction with regard to criminal matters on the Klamath Reservation that it has over any other land in Oregon.

State Jurisdiction over Criminal Trespass Actions on Klamath Indian Reservation, M-36362 (Aug. 13, 1956) 63 I. D. 253

INDIANS--Continued

HUNTING AND FISHING--Continued

An Indian, like any other citizen, when outside the confines of his reservation, is amenable to the State law, in the absence of treaty provisions according him or his tribe special rights. If there is no treaty giving an Indian an unrestricted right to hunt and fish off his reservation, he is in no better position than anyone else as to proving that wild game in his possession during a closed season was legally killed.

Imposition of North Dakota State Fish and Game Laws on Indians Claiming Treaty and Other Rights to Hunt and Fish, M-36410 (Feb. 11, 1957)

LAW AND ORDER

An ordinance requiring all Indian owners of livestock who desire to remove their livestock from the Fort Hall Reservation to obtain a permit is a valid exercise of the powers enumerated in the tribal constitution. Such ordinance does not contravene the act of August 15, 1953 (67 Stat. 590; 18 U.S.C. sec. 1157).

Attempted Ordinance by Fort Hall Business Council re Permits for Sale of Livestock and Branding, M-36363 (Aug. 24, 1956)

An Indian tribe having voted its preference to have a "dry reservation" under the local option clause of the act of August 15, 1953 (67 Stat. 586), has not necessarily committed itself irrevocably, but may later suspend the application of the Federal Indian liquor laws by duly adopted ordinance certified by the Secretary of the Interior and published in the Federal Register.

Interpretation of "Local Option" Clause of Repeal of Indian Liquor Law Act of August 15, 1953 (67 Stat. 586), M-36447 (Nov. 6, 1957)

RECEIPT OF GOVERNMENT BENEFITS

Other than in contracts for the construction of projects undertaken pursuant to the Navajo-Hopi Rehabilitation Act of April 19, 1950 (64 Stat. 44, 45; 25 U.S.C. 633), the provisions in construction contracts executed by officers of the Bureau of Indian Affairs which require contractors to afford Indians a preference right to employment is in conflict with the non-discrimination requirement of E.O. 10557

INDIANS--Continued

RECEIPT OF GOVERNMENT BENEFITS --Continued

(19 F.R. 5655; September 3, 1954) and should be discontinued.

Non-Discrimination by Government Contractors, M-36285 (June 15, 1955)

Upon the issuance of a proclamation, Indians who are subject to section 23 of the act of August 27, 1954 (68 Stat. 868, 877), will not be entitled to preferment in employment by the Bureau of Indian Affairs.

The positions of Indians subject to section 23 of the act of August 27, 1954, who are presently employed by the Bureau of Indian Affairs will remain in the excepted category in which they have been placed by the Civil Service Commission so long as the Commission's regulations remain unchanged.

Indian Preference in Employment, M-36297 (Aug. 24, 1955)

Indians entitled to receive direct benefit from an appropriation of $106,500 under the act of July 6, 1954 (68 Stat. 452), must (1) be members of the Yankton Sioux Tribe; (2) they must reside or have resided on land taken for the Fort Randall Dam and Reservoir project; and (3) the land must have been tribal or allotted.

Interpretation of Section 8 of Public Law 478 (83d Cong., 2d sess.), 68 Stat. 452, M-36319 (Jan. 5, 1956)

TAXATION

Generally

The power of local taxation cannot be asserted against the property of the Alaskan Indians without congressional authorization.

Organization of School Districts on Indian Reservations in Alaska, M-36367 (Sept. 17, 1956) 63 I.D. 33?

The governing body of the Three Affiliated Tribes on the Fort Berthold Reservation acted within the scope of the traditional authority of

INDIANS--Continued

TAXATION--Continued

Generally--Continued

Indian tribes to tax persons under their jurisdiction and to exercise such other reasonable governmental powers as are necessary to maintain law and order and to provide traditional governmental services except in so far as such functions have been assumed by the paramount government, the United States, when, by Resolution dated March 11, 1948, the Tribal Business Council imposed a sales tax on the gross sales on all cattle and horses sold on or off the reservation, and on sales of crops produced as a result of revolving credit financing.

There is no legal objection to the imposition of the tribal sales tax designated by Tribal Business Council resolution. The tax is enforced against all of a class, namely, those who have produced livestock and crops "as a result of revolving credit financing." The borrowers were or should have been aware of the tax prior to their application for loans.

Sales Tax, Three Affiliated Tribes of the Fort Berthold Reservation, M-36448 (Mar. 3, 1958)

The scope of restrictions imposed on land purchased with trust or restricted funds derived from Kaw sources was not broadened by the Act of June 20, 1936, as amended, but the exemption from taxation created by this act followed the restrictions and continued only so long as restrictions existed.

Restrictions on Individually-Owned Purchased Lands of Kaw Indians, Oklahoma, M-36538 (Nov. 10, 1958)

State

Tribal royalties from Government leases for the development of oil and gas resources on the Fort Peck Indian Reservation, Montana, are subject to the privilege and license tax authorized by the State under an act of Congress which provides that the State may tax the production of oil and other minerals produced from restricted Indian lands the same as if produced from privately-owned lands.

Right of the State to Impose a Privilege and License Tax Against the Royalty Interest of the Indian Tribes of the Fort Peck Reservation, Montana, M-36310 (Oct. 13, 1955)

INDIANS--Continued

TAXATION--Continued

State--Continued

Taxable lands located outside the Cheyenne River Reservation which are purchased for Indians pursuant to Section XI of the act of September 3, 1954 (68 Stat. 1191), remain subject to taxation even though the lands are reconveyed to the Indians by trust patent.

Interpretation of Section XI, Public Law 776, 83d Congress (68 Stat. 1191), Cheyenne River Act, M-36320 (Dec. 22, 1955)

The acts of May 29, 1924 (43 Stat. 244; 25 U.S.C. sec. 398), and of March 3, 1927 (44 Stat. 1347; 25 U.S.C. sec. 398c), subject royalties from all mineral leases on unallotted lands to State production taxes.

State Production Taxes on Tribal Royalties From Leases Other Than Oil and Gas, M-36345 (May 4, 1956)

TRADERS

The act of June 30, 1834 (4 Stat. 738, 25 U.S.C. sec. 68), forbids persons employed in Indian affairs from having any interest or concern in any trade with the Indians, except for, and account of the United States. Although the exact bounds of this prohibition have not been judicially determined, the Department of the Interior will not authorize any Government employee engaged in Indian affairs to perform services for pay for individual Indians, Indian tribes, associations or corporations. The employment of a Government employee as a tribal interpreter for pay raises such a close question of possible violation of the subject statute as to require disapproval of the proposed dual employment.

Employment as Interpreter of Government Employee By Navajo Tribe, M-36340 (Apr. 2, 1956)

IRRIGATION CLAIMS

(See also Bureau of Reclamation, Eminent Domain, Reclamation Lands, Torts)

WATERS AND WATER RIGHTS

Generally

An owner of property adjoining or near a lake has no legal right to the salts which he extracts from waters appropriated from the lake and sells for medicinal purposes. Accordingly, even if activities of the Bureau of Reclamation cause the dilution or reduction of the salinity of the lake, such damage cannot be the foundation for a valid claim for damages against the Government.

Claims of Mrs. Roxie Thorson and Mrs. Marie E. Downs, T-710 (Ir.) (Jan. 19, 1956) 63 I. D. 12

Flooding and Overflow

Article 6 of the form of land-purchase contract used by the Bureau of Reclamation for several years prior to its revision in 1952 which provides in pertinent part that the amount paid by the United States for the purchased land should constitute "full payment for all damages for entry upon the said property and the construction, operation, and maintenance of reclamation works thereon * * *" has been interpreted by several rulings of the Solicitor beginning in 1948 to release the Government from liability for damage to remaining lands which are appurtenant to the land purchased from the claimant. Such rulings are hereby reversed and claims denied on that basis will be reconsidered on their merits.

Claims of Mr. and Mrs. Arnold Streit and Bertha C. Hurley, T-476 (Ir.)(Supp.) (Jan. 31, 1955) 62 I. D. 12

Where property was damaged by flooding and the evidence indicates that Bureau of Reclamation activities, including pumping operations, reduced the water level of a lake below what it would have been under natural conditions, the owner may not be reimbursed from funds made available under the Public Works Appropriation Act, 1956.

Claims of Mrs. Roxie Thorson and Mrs. Marie E. Downs, T-710 (Ir.) (Jan. 19, 1956) 63 I. D. 12

LABOR

(See also Contracts)

EIGHT-HOUR LAW

Employees of the Bureau of Indian Affairs whose duties are to drive trucks hauling food from a central purchasing and processing point are laborers within the meaning of section 1 of the act of August 1, 1892, as amended (40 U. S. C. sec. 321). Such employees come within the provisions of this section without respect to whether or not they are employed upon a public work of the United States.

Applicability of Eight-Hour Law, M-36365 (Aug. 22, 1956)

NONDISCRIMINATION

Other than in contracts for the construction of projects undertaken pursuant to the Navajo-Hopi Rehabilitation Act of April 19, 1950 (64 Stat. 44, 45; 25 U.S.C. 633), the provisions in construction contracts executed by officers of the Bureau of Indian Affairs which require contractors to afford Indians a preference right to employment is in conflict with the nondiscrimination requirement of E. O. 10557 (19 F. R. 5655; September 3, 1954) and should be discontinued.

Non-Discrimination by Government Contractors, M-36285 (June 15, 1955)

WAGE RATES

Where a contract contains a labor escalator clause, providing for adjustment of changes in costs of labor after a certain period, the contractor is not entitled to the benefit of the clause when he has extended the hours of the working week beyond those permitted by the contracting officer in accordance with the terms of the contract.

Appeal of Lowdermilk Brothers, IBCA-10 (Feb. 11, 1955)

A contractor who prior to the acceptance of its bid agreed to be bound by an expected redetermination of minimum wage rates by the Department of Labor is not entitled to additional compensation by reason of paying such wage

LABOR--Continued

WAGE RATES--Continued

rates, which were generally higher than the previous ones, when under the regulations of the Department of Labor governing wage determinations, such determinations did not become obsolete until more than 90 days had elapsed since the award of the contract to which the rates applied, and the contract was awarded within this period. Under the circumstances of the present case, the contract was awarded when the contracting officer finally notified the contractor that he had been awarded the contract rather than when the contract and bond forms were forwarded to the contractor for preliminary examination and execution.

Appeal of J. D. Armstrong Company, Inc., IBCA-40 (Aug. 17, 1956) 63 I. D. 289

Neither the provisions of the Davis-Bacon Act nor any other consideration of public policy precludes the insertion of a provision in a Government construction contract that the contractor shall be bound by an expected redetermination of minimum wage rates by the Department of Labor and that no increase in the contract price will be allowed because of such substitution.

Appeal of Bushman Construction Company, IBCA-103 (Mar. 29, 1957)

The claim of a contractor engaged in the construction of substations for the Bonneville Power Administration that he was obliged to incur expenses for overtime by reason of an order of the contracting officer to accelerate the work must be rejected when it appears that the contractor was greatly behind in his work at that time; that the contracting officer had the express right under the specifications to direct that the contractor's work force be increased when a satisfactory rate of progress was not being maintained; and that the contracting officer merely authorized the overtime work. Although the contractor had prior thereto requested an extension of time, and the contracting officer had failed to act on the request, the contractor cannot be said to have been prejudiced when the request was not made at the time the delays occurred; the contractor did not demur against the contracting officer's inaction, and the contracting officer, after virtually granting the contractor's request at the time the work was ordered to be accelerated, finally granted an adequate extension of time.

Appeal of W & W Company, IBCA-54 (Aug. 4, 1958)

MATERIALS ACT

Where the Department of the Air Force exercises for national defense purposes the reversionary clause required by 16 U.S.C. sec. 667b with respect to formerly withdrawn public lands which had been transferred to a State for wildlife purposes under the above statute, the subsequent jurisdiction of that Department rests not upon the former withdrawal, but rather on the exercise of a statutory power. Consequently, reserved non-leasable minerals which had been transferred to the Department of the Interior for administration under the public land laws remain subject to disposal under the Materials Act. (43 U.S.C. sec. 1185.)

Where withdrawn public lands have been transferred to a State pursuant to 16 U.S.C. sec. 667b and the reserved minerals have been transferred to the Interior Department for administration under the public land laws, the non-leasable reserved minerals, including tungsten, are subject to disposal under the Materials Act, 43 U.S.C. sec. 1185.

Availability of a Non-Leasable Mineral (Tungsten) in Former Ft. Huachuca Military Reservation, Arizona, M-36256 (Jan. 18, 1955)

The Bureau of Land Management may issue permits to the Alaska Road Commission under the Materials Act authorizing the Commission to remove roadbuilding material from sections reserved for the Territory of Alaska by the act of March 4, 1915 (48 U.S.C. 353), providing consent of the Territory is first obtained.

School Sections Reserved by the Act of March 4, 1915 (38 Stat. 1214; 48 U.S.C. 353), For the Territory of Alaska, M-36243 (Feb. 8, 1955) 62 I.D. 22

Where under the terms of a Materials Act contract for the sale of timber an application for extension of time for severance and removal of timber must be filed not less than 90 days before the expiration of the contract, an application for extension filed 20 days after the expiration date of the contract is properly rejected.

Clyde Williams, A-27388 (Oct. 31, 1956)

Where the printed form of contract for the sale of materials under the act of July 31, 1947, provides two alternative methods for determining the total price to be paid for the materials, one under which the total price is to be specifically stated in the contract and the other under which the total price is to be determined on the

MATERIALS ACT--Continued

basis of the materials actually removed, and where a contract for the sale of timber was executed on that form from which the second method for determining the price had been stricken, the purchaser's obligation under the contract is to pay the total price specified in the contract, notwithstanding the fact that another, inconsistent, paragraph of the printed form was not deleted from the contract as it should have been.

Russell & Pugh Lumber Company, A-27432 (May 20, 1957)

The Materials Act, as amended and supplemented by the act of July 23, 1955 (69 Stat. 367; 30 U.S.C., 1952 ed., Supp. IV, sec. 601), is not applicable to materials in part constituting and in part extending below the surface of an unpatented mining claim.

Disposal of Sand and Gravel From Unpatented Mining Claims, M-36467 (Aug. 28, 1957)

An oil and gas lessee is not entitled by virtue of his leasehold interest to take and use mineral materials, other than oil and gas, from the leased lands for the purpose of operations under the lease. The Materials Act of July 31, 1947 (61 Stat. 681; as amended, 30 U.S.C., 1952 ed., Supp. V, sec. 601), limits disposal of such materials to disposals under that act and, absent other authority of law, that act governs.

Rights of an Oil and Gas Lessee to the Use of the Surface of the Land and Surface Materials in His Lease, and With Respect to Injury to the Land and Vegetation by Reason of Operations Under the Lease, M-36575 (Aug. 26, 1959)

An application filed under the Materials Act of July 31, 1947 (61 Stat. 681, as amended; 30 U.S.C., 1952 ed., Supp. V, secs. 601-604), to purchase sand and gravel does not segregate those minerals from location under the United States mining laws if the minerals in fact are subject to such location. The mere fact that the sand and gravel can be sold under the Materials Act does not make the deposits subject to mining location.

Conflict of Purchase Application and Contract Under the Materials Act With a Placer Mining Location, M-36581 (Sept. 25, 1959)

MIGRATORY BIRD CONSERVATION ACT

Where a female migratory bird is lawfully possessed without a permit by a public institution, the increase or progeny of such female bird may be lawfully possessed without a permit by such public institution.

The United States acquires no proprietary interest in migratory birds solely by reason of its asserted sovereignty over them.

Section 6.14, Title 50, Code of Federal Regulations, relating to migratory birds, permits zoological parks and other public institutions to possess, transport, and dispose of lawfully acquired migratory birds without a permit and the captive female whooping crane known as Josephine may, therefore, be lawfully possessed by the Audubon Park Zoo in New Orleans.

Ownership of Certain Captive Whooping Cranes, M-36571 (Jul. 20, 1959)

The State of Georgia has given qualified consent for the acquisition by the United States of wildlife sanctuaries and other reservations in designated sections of the State. Act of March 30, 1937, Ga. Laws 1937, p. 458. Ga. Code Ann., Tit. 15, sec. 15-304.

Consent of the State wherein the land lies must be first secured before the Secretary of the Interior may accept a deed or instrument of conveyance of lands acquired under the terms of the Migratory Bird Conservation Act of February 18, 1929, 16 U.S.C., 1952 ed., sec. 715 et seq.

State Consent Necessary in Migratory Bird Conservation Land Acquisitions. State of Georgia Limited Consent, M-36564 (July 27, 1959)

MINERAL LANDS

GENERALLY

A State may not select mineral lands under an act passed subsequent to 1860 which grants land to that State even though the act does not, in terms, except mineral lands.

Act of June 20, 1894 (28 Stat. 94), M-36261 (Feb. 23, 1955)

MINERAL LANDS--Continued

GENERALLY--Continued

Since the passage of the Mineral Leasing Act of February 25, 1920, deposits of oil belonging to the United States are subject to acquisition only under the provisions of that act and are not subject to location under the mining laws.

R. J. Walter et al., A-27243 (Mar. 15, 1956)

Lands acquired by agencies of the United States are generally not subject to location under the mining laws or to leasing under the 1920 Leasing Act unless Congress has expressly or impliedly provided that such lands shall be subject to the mining and leasing laws applicable to public domain lands.

As to the minerals in Farm Security Administration lands not set out in the Mineral Leasing Act for Acquired Lands but acquired by the United States and transferred to the Department of the Interior pursuant to 64 Stat. 769; 7 U. S. C. sec. 1035, the pertinent law would be section 46 of Title IV of the Bankhead-Jones Act (50 Stat. 530; 60 Stat. 1064; 7 U. S. C. sec. 1020), and the regulations contained in 43 CFR 200. 31-200. 50.

Disposition of Mineral Interests in Lands Transferred to the Department of the Interior Pursuant to Public Law 760, 81st Congress, 2d Session (64 Stat. 769; 7 U. S. C. secs. 1033-1039), M-36485 (Oct. 28, 1957)

DETERMINATION OF CHARACTER OF

If the creation of a petroleum reserve is tantamount to the classification of the reserved lands as mineral, valuable for oil and gas, the rule applicable to lands classified as valuable for coal and, subsequent to the act of February 25, 1920, supra, oil shale would apply to them. That rule is that the locator of a mining claim or lands so classified may defeat the classification by proving, in a proper proceeding, that the land is, in fact, not valuable for the coal, oil shale, or oil and gas, whichever was named in the order classifying the land. Since the petroleum reserve stamps the land as prima facie valuable for oil or gas, the burden of proof rests upon the mining claimant.

Metalliferous Mining Locations Within a Petroleum Reserve, M-36375 (May 3, 1956) 63 I. D. 346

MINERAL LANDS--Continued

DETERMINATION OF CHARACTER OF--Continued

A mineral permit or a noncompetitive, nonproducing or nonpreference right mineral lease, standing alone, is not sufficient to justify classifying a school section as mineral in character.

Acts of April 22, 1954 (68 Stat. 57), and July 11, 1956 (70 Stat. 529), Amending the Act of January 25, 1927 (43 U.S.C. sec. 870), M-36408 (Feb. 7, 1957)

The removal of sand, gravel and certain other low-grade mineralized substances from the operation of the mining laws by Public Law 167, 84th Cong. (69 Stat. 367; 30 U.S.C. sec. 601 et seq.), did not constitute a determination that those substances are nonmineral in character.

Effect of Public Law 167, 84th Cong. (69 Stat. 367), on the Status of Minerals and Materials in Lands Patented Under the Stockraising Homestead Act, M-36417 (Feb. 15, 1957)

Where a petition for the restoration from withdrawal of certain lands as oil shale lands is rejected by the Bureau of Land Management on the basis of a determination that the land is properly classified as oil shale in character by the Geological Survey, and the Geological Survey subsequently determines that a portion of the land is not oil shale in character, the case will be remanded to the Bureau for action looking to the allowance of the petition as to this land.

Rea L. Eaton, A-27377 (Mar. 18, 1957)

The nonmineral character of public land is established by the inclusion of the land in a patent under a railroad land grant which excludes mineral lands and cannot be disturbed after issuance of the patent.

Patricia T. Zebal et al., A-27616 (July 18, 1958) 65 I. D. 293

LEASES

The Department of the Interior has no authority to issue permits or leases for the exploration or mining of tungsten deposits in

MINERAL LANDS--Continued

LEASES--Continued

land acquired by the Department of the Army in connection with the construction and operation of the John H. Kerr Dam and Reservoir Project, Virginia-North Carolina.

Seminole Rock and Sand Company, A-27282 (Feb. 24, 1956)

Where there is a dispute between the holder of a manganese lease and another person as to whether an assignment of an undivided interest in the lease was made to the latter and there are some unexplained circumstances surrounding the assignment, the Department will not act on the purported assignment until the dispute between the parties has been resolved by the courts or by the parties themselves.

John H. Corridon, A-27390 (Feb. 18, 1957)

The Bureau of Land Management does not have authority to issue a uranium lease for lands acquired by the United States and held in trust for the Pueblos of Zia and Jemez, and an application for such a lease is properly rejected even though it was filed before the passage of the act of August 2, 1956, providing that the lands were to be held in trust for the Indians.

William Williams, Jr., A-27596 (July 21, 1958)

MINERAL RESERVATION

The provisions of the act of March 3, 1909 (35 Stat. 844; 30 U.S.C. sec. 81), and the act of July 17, 1914 (38 Stat. 509; 30 U.S.C. sec. 121), as amended and supplemented, requiring a reservation of certain minerals in lands withdrawn, classified or which are valuable for such minerals, are applicable to State selections made by an act granting lands to a State where that act has, as passed, applied only to nonmineral lands.

Act of June 20, 1894 (28 Stat. 94), M-36261 (Feb. 23, 1955)

The removal of sand, gravel and certain other low-grade mineralized substances from the operation of the mining laws by Public Law 167, 84th Cong. (69 Stat. 367; 30 U.S.C. sec. 601 et seq.), has no relation to the question of

MINERAL LANDS--Continued

MINERAL RESERVATION--Continued

whether a reservation of "coal and other minerals" under section 9 of the Stockraising Homestead Act (43 U.S.C. sec. 299) includes them.

Effect of Public Law 167, 84th Cong. (69 Stat. 367), on the Status of Minerals and Materials in Lands Patented Under the Stockraising Homestead Act, M-36417 (Feb. 15, 1957)

In processing exchange applications of Indian trust patent allotments under the act of March 3, 1921 (41 Stat. 1239), 43 CFR 149.35 to 149.43, (1) where there are outstanding prior oil and gas applications or leases on the selected lands the outstanding prior oil and gas applications on the selected lands should be rejected, and the lands should be conveyed subject to any outstanding leases, and (2) where the selected lands are reported prospectively valuable for oil and gas, but are not under oil and gas application or lease there should not be any reservation or exception of minerals in the selected lands, but any minerals in the selected lands should be patented along with the lands. Nevertheless, the mandate of the regulation to exchange equal values must be kept in mind.

Mineral Reservations in Exchanges of Indian Trust Patent Allotments Under the Act of March 3, 1921, M-36436 (May 9, 1957)

Where land within a reclamation homestead entry upon which final reclamation proof has not been submitted is reported as prospectively valuable for oil and gas, the owner of the entry is correctly required to file consent to a reservation in the United States of the oil and gas in the land embraced within the entry in the absence of a satisfactory showing to support an application for a reclassification of the land as nonmineral.

John W. Mustonen, George Shipp, Glen L. Dix, A-27465, A-27467, A-27516 (Aug. 12, 1957)

The act of July 17, 1914, permitting the appropriation and patenting, with a mineral reservation in the United States, under the nonmineral land laws of lands withdrawn, classified, or valuable for specified minerals is not applicable to the restoration of ceded Indian lands to tribal ownership under the Indian Reorganization Act.

Arthur F. C. Hoffman, A-27541 (Feb. 7, 1958)

MINERAL LANDS--Continued

MINERAL RESERVATION--Continued

When land within a desert land entry is reported to be prospectively valuable for oil and gas before the entryman submits final proof, it is proper to require the entryman to file consent to a reservation to the United States of the oil and gas covered by the entry or to contest the mineral classification of the land.

Allien M. Whitsett, Jr., and William J. Ripling, A-27611 (Sept. 15, 1958)

When land within an amended reclamation farm unit is reported to be prospectively valuable for oil and gas before the entryman has fulfilled all of the requirements for patent, it is proper to require the entryman to file consent to reservation to the United States of the oil and gas covered by the entry or to contest the mineral classification of the land.

Mildon L. Patterson, A-27766 (Dec. 18, 1958)

MULTIPLE MINERAL DEVELOPMENT

The Multiple Mineral Development Act does not authorize the issuance of oil and gas leases on lands covered by valid mining claims which were located on lands subject thereto in 1948, several years before the filing of oil and gas lease applications therefor.

Marion F. Jensen et al., Elden F. Keith et al., A-27254, A-27256, A-27257 (Feb. 24, 1956) 63 I. D. 71

Section 7 of the Multiple Mineral Development Act may be invoked against all unpatented mining claims, whether they are identifiable or not or whether the names and addresses of the locators are known or not.

Where an oil and gas lessee initiates action under section 7 of the Multiple Mineral Development Act for land covered by an application for a mineral patent, the proceedings will be allowed to continue through publication and the filing of a verified statement by the patent applicant, but then the section 7 proceedings will be stayed until the patent application is disposed of.

MINERAL LANDS--Continued

MULTIPLE MINERAL DEVELOPMENT--Continued

Section 7 of the Multiple Mineral Development Act applies to all conflicts between a lessee, applicant, permittee or offeror under the mineral leasing laws and a claimant under the mining laws, including mineral claims based upon minerals now subject to disposition only under the mineral leasing laws.

The fact that an application for a mineral patent has been filed for lands included within an oil and gas lease does not prevent the oil and gas lessee from initiating proceedings under section 7 of the Multiple Mineral Development Act.

Union Oil Company of California, Ramon P. Colvert, A-27532 (May 28, 1958) 65 I. D. 245

Where an oil and gas lessee initiates action under section 7 of the Multiple Mineral Development Act for land covered by an application for a mineral patent, the proceedings will be allowed to continue through publication and the filing of a verified statement by the patent applicant, but then the section 7 proceedings will be stayed until the patent application is disposed of.

Gabbs Exploration Company, United States Smelting Refining and Mining Company, A-27994 (Aug. 11, 1959)

NONMINERAL ENTRIES

Where land offered for public sale is subsequently reported to be prospectively valuable for oil and gas, it may not be disposed of under the public sale law except with a reservation to the United States of the oil and gas deposits in the land.

Alexander David Norton, A-27040 (Mar. 7, 1955)

Lands valuable for uranium are not subject to public sale as isolated tracts.

Buck Willcoxson, A-27402, A-27403 (Dec. 17, 1956)

A State indemnity selection is properly rejected where the lands are reportedly valuable for sodium, potash, and other minerals and are included in a potash lease, and where the disposal of the surface rights would interfere unreasonably with operations under the mineral leasing laws.

State of California, A-27805 (Feb. 19, 1959)

MINERAL LANDS--Continued

NONMINERAL ENTRIES--Continued

Lands valuable for uranium are not subject to public sale as isolated tracts.

Roscoe T. Schafer, A-28131 (Aug. 27, 1959)

PROSPECTING PERMITS

A uranium prospecting permit is properly refused as to lands in which the United States owns only a 50 percent interest in the minerals, unless the applicants can show acquisition of such interests or operating rights therein which, with the interest of the United States, totals a majority of the mineral rights in the lands.

Kenneth E. Winn, Eugene Hood, A-27689 (Oct. 6, 1958)

An application for a prospecting permit for fissionable source materials is properly rejected where the lands applied for are acquired lands being administered by the United States Fish and Wildlife Service as a part of the Charles Sheldon Antelope Range and where that agency objects to issuance of the permit on the ground that issuance of the permit would interfere with the use of the lands as an antelope range.

A. K. McGill, Jack A. Crane, A-27660 (Oct. 22, 1958)

The termination of a uranium prospecting permit shortly after its anniversary date, on which annual rental accrues, for failure to pay such rent does not relieve the permittee of his liability for the accrued rent.

Welland S. Horn, Reginald A. Barnard, A-28062 (Nov. 5, 1959)

MINERAL LEASING ACT

GENERALLY

Metalliferous mining locations could be made within petroleum reserves prior to the act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 181), even if the land was then known to contain oil or gas. After that enactment and prior to the enactment of the acts of August 12, 1953 (Public Law 250; 67 Stat. 539), and August 13, 1954 (Public Law 585; 68 Stat. 708), lands valuable for oil or gas were not subject to location under the United States mining laws. But only lands known to contain those minerals were excluded from location for metalliferous minerals.

Metalliferous Mining Locations Within a Petroleum Reserve, M-36375 (May 3, 1956) 63 I. D. 346

Section 1 of the Mineral Leasing Act of 1920 (30 U.S.C. secs. 181 et seq.) contains sufficient authority for the leasing of fractional mineral interests in lands having the status of public lands of the United States.

Conveyance of the Surface and a Fractional Mineral Interest Therein to the United States in Forest Exchanges, M-36415 (Jan. 30, 1957)

The Secretary of the Interior is not authorized by law to effectuate the policies of the Mineral Leasing Acts so singlemindedly that he is thereby equally required to ignore the objectives of the wildlife conservation laws.

Validity of Regulations Relating to Oil and Gas Leases on Wildlife Refuges, Game Range and Coordination Lands, M-36519 (July 15, 1958) 65 I. D. 305

The Secretary of the Interior (or his delegate) is authorized by section 29 of the Mineral Leasing Act to issue a permit for slant wells to be drilled through lands subject to that act, even though the land for which the permit is issued is merely covered by offers to lease for oil and gas, but no leases have been issued.

Floyd A. Wallis, The California Company, A-27547 (Sept. 19, 1958) 65 I. D. 417

The requirements contained in original sections 13 and 14 of the act of February 25, 1920 (41 Stat. 437, 441 and 442), do not apply to noncompetitive oil and gas leases to be issued under section 17 of the act of February 25, 1920

MINERAL LEASING ACT--Continued

GENERALLY--Continued

(41 Stat. 437, 443), as amended by the act of August 21, 1935 (49 Stat. 674, 676 and 677), and as further amended by section 3 of the act of August 8, 1946 (60 Stat. 950, 951; 30 U. S. C. sec. 226). Section 17 has never contained authority for conforming unsurveyed leased lands to public survey.

If an oil and gas lease describing lands by metes and bounds description does not embrace all the lands in a subdivision that is established by a subsequent official survey, the unleased lands within that subdivision may be considered available for leasing provided that the Department determines that the leasing of the unleased lands will be in the public interest.

Noncompetitive Oil and Gas Lease Applications and Leases on Unsurveyed Public Lands Within the United States Under the Mineral Leasing Act of February 25, 1920, as Amended, M-36542 (Aug. 8, 1958)

(Memorandum from Regional Solicitor, Denver, Colorado, to Area Administrator, Area 3, Bureau of Land Management, Denver, Colorado, August 8, 1958.)

The Secretary of the Interior may, in the exercise of his discretion, refuse to lease lands which are subject to lease under the terms of the Mineral Leasing Act where there are hidden dangers in the lands due to former military use and where the State of Alaska has expressed a desire to have an opportunity to select the lands under the Alaska Statehood Act and their leasing for oil and gas purposes would preclude that opportunity.

H. T. Birr, III, et al., A-27947 (Jul. 23, 1959)

APPLICABILITY

The Mineral Leasing Act applies to minerals reserved pursuant to any prior act which merely reserved the minerals but contained no provision for their disposal.

Applicability of 43 CFR 199.40-199.56 Authorizing Mineral Disposal in Certain Lands to Lands Acquired by the City and County of Denver, Colorado, Under the act of August 25, 1914 (38 Stat. 706), M-36279 (July 19, 1955)

MINERAL LEASING ACT--Continued

APPLICABILITY--Continued

Section 8(d) of the act of July 7, 1958 (72 Stat. 339), the Alaska Act of Admission into the Union as a State, when it provided that all of the laws of the United States shall have the same force and effect within the State of Alaska as elsewhere within the United States included in those laws, laws that apply only to Alaska at the time of its admission as a State and where as of that time a special law applicable only to Alaska covers the whole of any particular field which is also covered by a general law, the special law will continue to operate rather than the general law, by the force of the provisions of section 8, unless repealed in terms or by clear implication. Thus the Alaska Coal Leasing Act of October 20, 1914 (38 Stat. 741; 48 U. S. C., sec. 32), continues to be the law applicable to the disposition of coal deposits belonging to the United States and the coal leasing provisions of the act of February 25, 1920, do not apply to them.

Applicability of the Coal Leasing Provisions of the Act of February 25, 1920 (41 Stat. 437; 30 U.S.C., sec. 181 et seq.) as Amended, to the State of Alaska, M-36551 (Feb. 4, 1959)

LANDS SUBJECT TO

Where oil and gas deposits reserved to the United States under stockraising homestead entries or patents were undisposed of on March 1, 1933, when the lands containing such deposits were permanently withdrawn from all forms of entry or disposal, those deposits are not subject to leasing under the terms of the Mineral Leasing Act.

Devearl W. Dimond, A-27131 (July 5, 1955)
62 I. D. 260

Lands acquired for National forests under the General Exchange Act of March 20, 1922 (42 Stat. 465), have the status of public lands of the United States and are therefore subject to leasing under the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C. sec. 181 et seq.).

Applicability of the General Mining and Mineral Leasing Laws to Lands Acquired for National Forests, M-36421 (Feb. 18, 1957)

The Mineral Leasing Act of 1920 is not applicable to lands within an Indian reservation.

Arthur F. C. Hoffman, A-27541 (Feb. 7, 1958)

MINERAL LEASING ACT--Continued

LANDS SUBJECT TO--Continued

Where title to land is in the State of New Mexico under a grant to the Territory of New Mexico later confirmed in the State, the land is not subject to leasing under the terms of the Mineral Leasing Act.

John E. Miles, A-27577 (June 12, 1958)

Land included in a valid mining claim is not subject to leasing under the terms of the Mineral Leasing Act.

Union Oil Company of California v. Western Drilling and Producing Co. et al., A-27588 (July 14, 1958)

Where the records of the Department show that public lands have been set aside as a permanent addition to an Indian reservation, those lands are not available for oil and gas leasing under the provisions of the Mineral Leasing Act.

G. E. Kadane & Sons, A-27671 (Oct. 30, 1958) 65 I. D. 446

Lands withdrawn by the Secretary of the Interior in aid of proposed legislation for the benefit of Indians and placed under the administrative control of the Commissioner of Indian Affairs are not available for oil and gas leasing under the Mineral Leasing Act.

Betty Ruth Wright et al., A-27519 (Nov. 14, 1958)

The Mineral Leasing Act of 1920 (30 U.S.C. 181, et seq.) normally applies to ceded Indian lands where the cession is absolute.

Leasability of Ceded Lands Used by the United States for the Benefit of the Indians, M-36540 (Jan. 8, 1959)

Where the records of the Department show that lands have been set apart for the use and occupation of Indians, those lands are not available for oil and gas leasing under the provisions of the Mineral Leasing Act.

Charles B. Gonsales, A-27944 (Apr. 22, 1959)

MINERAL LEASING ACT--Continued

LANDS SUBJECT TO--Continued

The Secretary of the Interior may, in the exercise of his discretion, refuse to lease lands which are subject to lease under the terms of the Mineral Leasing Act where there are hidden dangers in the lands due to former military use and where the State of Alaska has expressed a desire to have an opportunity to select the lands under the Alaska Statehood Act and their leasing for oil and gas purposes would preclude that opportunity.

Where lands have been withdrawn or reserved for the use of any agency of the Department of Defense, they are not subject to leasing under the terms of the Mineral Leasing Act without the consent of the Secretary of Defense.

H. T. Birr, III, et al., A-27947 (Jul. 23, 1959)

Where the United States retains only the bare legal title to land, a claim to which has been confirmed by an act of Congress, that land is not subject to the operation of the Mineral Leasing Act.

Floyd A. Wallis et al., A-26944 (Aug. 4, 1959)

MINERAL LEASING ACT FOR ACQUIRED LANDS

GENERALLY

Subject to the limitations imposed by the Mineral Leasing Act for Acquired Lands, the leasing of mineral deposits in lands acquired by the United States is discretionary with the Secretary of the Interior.

Alexander Grinstein, A-27037 (Mar. 7, 1955)

Interests in any of the minerals named in the Mineral Leasing Act for Acquired Lands and transferred by the Secretary of Agriculture to the Secretary of the Interior pursuant to section 3 of the act of September 6, 1950 (64 Stat. 769; 7 U. S. C. sec. 1035), are subject to leasing under the Mineral Leasing Act for Acquired Lands and 43 CFR 200.6 is applicable to holdings of such interests.

Acquired Lands--Public Law 760, 81st Congress (64 Stat. 769), M-36496 (Feb. 4, 1958) (Memorandum from Regional Solicitor, Denver, Colorado, to State Supervisor, Bureau of Land Management, Denver, Colo., Dec. 23, 1957.)

MINERAL LEASING ACT FOR ACQUIRED LANDS
--Continued

CONSENT OF AGENCY

Where applications for noncompetitive oil and gas leases on acquired lands have been rejected by the Bureau of Land Management because of the refusal of the agency having jurisdiction over the lands to consent to leasing and where the agency thereafter conveys the lands, reserving to the United States an undivided interest in the minerals, and consents to the leasing of the mineral estate, the applications will be returned to the Bureau of Land Management for further consideration.

Maude Sullivan Thomas et al., A-27128, A-27129 (Mar. 16, 1955)

An oil and gas lease application is properly rejected where the land applied for lies within the boundaries of land acquired by the United States as a dam site and is being administered by the Department of the Army which objects to approval of the application because development of oil and gas deposits in the land will interfere with the primary purpose for which the land was acquired.

Robert Wilson, A-27206 (Nov. 7, 1955)

Where the agency having jurisdiction over acquired lands consents to the issuance of an oil and gas lease on such lands, but withdraws the consent before a lease is issued, this Department is not authorized to lease such lands.

L. D. Dale, A-27166 (Nov. 14, 1955)

Lands subject to oil and gas leasing under the Mineral Leasing Act for Acquired Lands cannot be leased without the consent of the agency having jurisdiction over such lands.

D. Miller, A-27378 (Oct. 15, 1956)

Where an oil and gas offer for Veterans Administration lands is rejected solely on the ground that that agency has previously refused consent to lease the land pursuant to earlier applications, and it appears that because of changed methods of drilling and production the Veterans Administration may be willing to reconsider its previous position, the case will be remanded to ascertain the current position of that agency.

Tom H. Dowlen, A-27724 (Nov. 17, 1958)

MINERAL LEASING ACT FOR ACQUIRED LANDS
--Continued

CONSENT OF AGENCY--Continued

An applicant for a noncompetitive lease of acquired lands being administered by the Forest Service is properly required to file written consent to stipulations imposed by that agency as a condition precedent to issuance of the lease, or face rejection of his offer.

Celia R. Kammerman et al., A-27768 (July 17, 1959) 66 I. D. 255

An applicant for a noncompetitive lease of acquired lands being administered by the Forest Service is properly required to file written consent to stipulations imposed by that agency as a condition precedent to issuance of the lease, or face rejection of his offer.

Merwin E. Liss, A-27924, A-27940 (Aug. 31, 1959)

Where an acquired lands oil and gas lease offer is rejected for the reason that the Bureau of Reclamation, which is administering the land, objects to issuance of the lease, and on appeal to the Secretary of the Interior that agency indicates that it will withdraw its objection provided the applicant agrees to accomplish removal of any oil and gas found by slant drilling from other lands, the case will be remanded for issuance of a lease permitting the lessee to drill under a procedure found to be unobjectionable by the Bureau of Reclamation.

The Bureau of Reclamation is not an agency whose consent is necessary to the issuance of an oil and gas lease under the Mineral Leasing Act for Acquired Lands.

Duncan Miller, A-28104 (Dec. 1, 1959)

LANDS SUBJECT TO

Acquired lands situated within national parks are not subject to leasing under the provisions of the Mineral Leasing Act for Acquired Lands.

Alexander Grinstein, A-27037 (Mar. 7, 1955)

An acquired lands oil and gas lease application is properly rejected where the land applied for has been declared to be surplus under

MINERAL LEASING ACT FOR ACQUIRED LANDS
--Continued

LANDS SUBJECT TO--Continued

the Surplus Property Act of 1944 and the mineral rights are being administered by the General Services Administration.

William O. Segerstrom, A-27076 (Mar. 31, 1955)

Where the extent of the mineral interest which the United States owns in acquired lands is in dispute, the Bureau of Land Management having issued leases purporting to cover the entire mineral interest in the lands and the Government's grantor claiming to own 50% of the minerals in the lands, that part of a decision declaring that the United States owns the entire mineral interest in the land will be set aside where the Government's grantor was not made a party to such decision and was not served with a copy of the decision allowing him a right of appeal therefrom and where a proper determination of the matter is necessary for the administration of the lands.

Halvor Holbeck, Mrs. E. B. McFadden, The Texas Company, A-27167, A-27182 (Nov. 14, 1955)

An acquired lands oil and gas lease is properly canceled as to a tract of land covered thereby which was not available for leasing when the application therefor was filed because the tract was included in a prior lease and the relinquishment and cancellation of the prior lease had not been noted on the acquired lands plat records when the subsequent application was filed.

B. E. Van Arsdale, A-27183 (Dec. 28, 1955)
62 I. D.475

Where applications for noncompetitive oil and gas leases for acquired lands are filed for lands which are embraced in outstanding leases which have been relinquished but the relinquishments have not been noted on the acquired lands plat books, the applications are prematurely filed and are properly rejected.

E. A. Vaughey, A-27291 (Mar. 28, 1956)
63 I. D. 85

Where all coal deposits have been reserved by the grantor and the surface estate and all minerals except coal have been conveyed to the United States, the United States cannot unqualifiedly lease uranium deposits found commingled and interspersed throughout the coal seams if the

MINERAL LEASING ACT FOR ACQUIRED LANDS
--Continued

LANDS SUBJECT TO--Continued

uranium development would destroy or damage the reserved coal in place or impair its value, but it may issue leases subject to the condition that if it became necessary to disturb the coal in place or impair its value, the uranium lessee must first acquire title to the coal or obtain the consent of the coal owner to the uranium operations.

Can the United States Lease Uranium Deposits Found Interspersed in Certain Coal Deposits Which were Reserved to the Grantor at the Time the Surface Estate and all Minerals Except Coal were Conveyed to the United States? M-36377 (Aug. 17, 1956)

Acquired lands situated within the limits of an incorporated city are not subject to leasing under the provisions of the Mineral Leasing Act for Acquired Lands.

D. Miller, A-27378 (Oct. 15, 1956)

Lands acquired for National forests under the act of March 4, 1917 (39 Stat. 1150), and those acquired by gift or donation for National forest purposes under section 7 of the act of June 7, 1924 (16 U.S.C. sec. 569), and section 5 of the act of March 3, 1925 (43 Stat. 1133), as amended (16 U.S.C. sec. 555), are subject to leasing under the Acquired Lands Leasing Act of August 7, 1947 (61 Stat. 913; 30 U.S.C. secs. 315 et seq.), as are lands acquired under the Bankhead-Jones Farm Tenant Act (7 U.S.C. secs. 1001 et seq.), whether or not embraced within National forests.

Applicability of the General Mining and Mineral Leasing Laws to Lands Acquired for National Forests, M-36421 (Feb. 18, 1957)

An oil and gas lease application for acquired land which is set apart for military purposes when the application is filed must be rejected as such land is not subject to leasing under the Mineral Leasing Act for Acquired Lands even though it is not being used for the purpose for which it is set apart and though the record indicates that the land may be reported to the General Services Administration as surplus.

Donald M. Snow, A-27464 (July 29, 1957)

MINERAL LEASING ACT FOR ACQUIRED LANDS --Continued

LANDS SUBJECT TO--Continued

Acquired land reserved for naval purposes is not subject to disposition under the Mineral Leasing Act for Acquired Lands, and an application for a noncompetitive oil and gas lease of such lands is properly rejected.

Donald C. Ingersoll, A-27536 (Jan. 23, 1958)

Acquired lands situated within the limits of an incorporated city or set apart for naval purposes are not subject to leasing under the provisions of the Mineral Leasing Act for Acquired Lands.

Duncan Miller, A-27566 (Apr. 29, 1958)

An acquired lands oil and gas lease application is properly rejected where the land applied for has been declared surplus under the Surplus Property Act of 1944 and the mineral rights are being administered by the General Services Administration.

Duncan Miller, Leland K. Whittier et al., A-27623 (July 28, 1958)

Lands are available for leasing under the Mineral Leasing Act for Acquired Lands where they are not part of an incorporated city although they are surrounded by the city.

Tom H. Dowlen, A-27724 (Nov. 17, 1958)

An oil and gas lease offer for mineral deposits within lands acquired by the United States which lands have been set apart for military or naval purposes is properly rejected under section 3 of the Mineral Leasing Act for Acquired Lands without any showing that the mineral deposits have also been so set aside.

Duncan Miller, A-27737 (Nov. 20, 1958)

Originally ceded lands as to which the United States has never parted with title cannot be considered to be "acquired lands" within the meaning of the Mineral Leasing Act for Acquired Lands.

Leasability of Ceded Lands Used by the United States for the Benefit of the Indians, M-36540 (Jan. 8, 1959)

MINES AND MINING

The Bureau of Mines, pursuant to section 5 of the act of May 16, 1910, as amended (36 Stat. 369; 30 U. S. C. sec. 7), and sec. 212(a) of the Federal Coal Mine Safety Act (66 Stat. 692, 709; 30 U. S. C. sec. 482(a)), has the authority to revise existing regulations or to promulgate new regulations affecting equipment in gassy coal mines whether previously certified as permissible or not, provided, (1) the regulations affect equipment acquired and certified as permissible subsequent to July 16, 1952, and not excluded by the provisions of section 209(f)(1) of the Federal Coal Mine Safety Act; (2) a finding and determination is made by the Bureau based on facts and circumstances not conclusions that the equipment is not experimental but is a demonstrated safety device designed to decrease or eliminate mine fires and explosions caused by the use of such equipment in gassy coal mines; and (3) that the provisions of the Administrative Procedure Act (5 U. S. C. secs. 1001-1011) are followed.

Applicability of Proposed Regulations Requiring Modification of Electric Face Equipment in Gassy Coal Mines, M-36508 (May 7, 1958)
65 I. D. 211

The statutory exemption of certain coal-mining equipment from the requirement of permissibility may be transferred only with the equipment and the mine to which it relates.

Transferability of Exemptions from the Requirement of Permissibility of Electrical Equipment in Gassy Mines Under Sec. 209(f)(1) of the Federal Coal Mine Safety Act, M-36586 (Oct. 26, 1959)

MINING CLAIMS

GENERALLY

A valid mining claim is, in effect, a grant by the United States of the right of present and exclusive possession of the land.

United States v. Wilmot D. Everett et al., A-27010 (Supp.) (Oct. 17, 1955)

A conflict between a lode claimant and a placer claimant is an adverse claim within the meaning of Rev. Stat. 2325-2326 and may be

made the basis of an adverse suit as provided therein.

A suit pending between two mining claimants prior to the time when one claimant files an adverse claim against the other claimant under Rev. Stat. 2326 may, under proper circumstances, be considered as an adverse action brought under that section, and where the highest court of a State has specifically held, in a suit involving the same parties and the same mineral deposit, that the suit in the State courts constitutes such an adverse action, the Department will accept the State court's holding.

Where an adverse suit brought in a State court pursuant to Rev. Stat. 2326 has terminated in a judgment adverse to the applicant for a mineral patent, he may not proceed further before the Department with his application and his application must be rejected.

Ethelyndal McMullin et al., International Mineral & Chemical Corporation, A-27170 (Oct. 20, 1955) 62 I. D. 395

The Department will adhere to its position that a mineral locator of an unpatented mining claim has no right to its surface resources, except such as may be required for actual mining purposes, and that the Department has authority to issue grazing leases under the Taylor Grazing Act to utilize the grazing resources on such claims.

Albert Braach, A-27225 (Dec. 28, 1955)

Since the passage of the Mineral Leasing Act of February 25, 1920, deposits of oil belonging to the United States are subject to acquisition only under the provisions of that act and are not subject to location under the mining laws.

R. J. Walter et al., A-27243 (Mar. 15, 1956)

Where lands within a reclamation withdrawal are conditionally restored to mineral location under the act of April 23, 1932 (47 Stat. 136, 137; 43 U.S.C. sec. 154 (1952)), and one of the conditions is that a contract if required by the United States as a condition precedent to the vesting of any rights in the locator is to be recorded in the local county records office pursuant to the act of April 23, 1932, supra, that condition is in addition to those of section 2324, Revised Statutes (1875), and a statement that

MINING CLAIMS--Continued

GENERALLY--Continued

such a contract has been entered into and recorded separately may be required of the locator to be incorporated in the certificate of location although the particular State statute defining the contents of the certificate of location does not provide for such a provision. There is no rule requiring that the certificate of location, which is a creature of State law, be filed in the local land office, but as a practical matter, incorporation of both the contract and the certificate of location into one instrument appears to be desirable for the locator.

Legality of Stipulations Required by the Bureau of Land Management Pursuant to the act of April 23, 1932 (47 Stat. 136, 137; 43 U.S.C. sec. 154 (1952)), Upon the Conditional Restoration of Lands Withdrawn Under the Reclamation Laws to Mineral Location, M-36404 (Jan. 7, 1957)

A reservation of minerals in a grant of the use and control of the surface of land to a State which merely provides that the United States, its agents or representatives may re-enter to mine and remove the minerals is not sufficiently broad to authorize the disposal of the land under the mining laws and it, therefore, would preclude the location of a mining claim.

Application of Mining Laws to Withdrawn Lands Used by a State for Wildlife Purposes, M-36407 (Jan. 25, 1957)

The "verified statement" which section 5 of the act of July 23, 1955 (69 Stat. 367; 30 U.S.C. sec. 1185), requires a miner to file if he desires to retain all of his rights with respect to use of the surface of his claim must be under oath.

Whether the "Verified Statement" Required by Section 5 of Public Law 167, 84th Congress, Must be Under Oath, M-36419 (Feb. 25, 1957)

The act of August 12, 1953 (67 Stat. 539; 30 U.S.C. sec. 501), validated a mining claim only if it had a valid discovery and otherwise would have been valid in the absence of the mineral lease or permit for the land.

Virgin No. 3 Lode Claim; Whether Discovery Made by Geological Survey May be Adopted by Locator of a Mining Claim as a Discovery to Support the Location, M-36424 (Mar. 4, 1957)

MINING CLAIMS--Continued

GENERALLY--Continued

A filing fee of $10 is payable by an adverse claimant at the time of filing an adverse claim against an application for mineral patent (43 CFR 185.84), but failure to pay the required fee at the time of submitting the claim does not nullify an otherwise sufficient claim, and the fact that the required fee was not paid until after the expiration of the period allowed for filing the claim does not defeat the claim, the fee having been promptly paid when requested of the adverse claimants.

California Perlite Corporation et al., A-27444 (July 22, 1957)

If a deputy mineral surveyor of the United States who executed the survey for patent on a mining claim was one of the two witnesses signing the affidavit required by statute and regulation for proof of posting on the claim of the plat and notice of intention to apply for patent, the patent application will be rejected, unless a supplemental affidavit by a proper witness is furnished, because regulatory provisions that the surveyor of a mining claim will not be allowed to prepare for the claimant papers in support of the application and that the surveyor must have absolutely nothing to do with the case except in his official capacity as surveyor disqualify the surveyor as a witness of posting for the patent applicant.

Seymour Gray et al. v. Milner Corporation, A-27431 (Aug. 21, 1957) 64 I. D. 337

The Materials Act, as amended and supplemented by the act of July 23, 1955 (69 Stat. 367; 30 U.S.C., 1952 ed., Supp. IV, sec. 601), is not applicable to materials in part constituting and in part extending below the surface of an unpatented mining claim.

The possessory title of the owner of an unpatented mining claim is limited to the right to mine and remove the "valuable" minerals and to use the surface and any materials on or in the claim only to the extent reasonably required in connection with his mining operations. Conversely, the United States may not take or dispose of materials on such a claim except to the extent authorized by statute.

Disposal of Sand and Gravel From Unpatented Mining Claims, M-36467 (Aug. 28, 1957)

MINING CLAIMS--Continued

GENERALLY--Continued

In the case where no verified statements have been filed, a proceeding under the act of July 23, 1955, is in the nature of a mineral contest except that in a regular contest where no answer is filed the proceeding is in personam.

Regardless of whether or not a verified statement is filed, the final action taken on a determination area under the act of July 23, 1955 (69 Stat. 369; 30 U. S. C. sec. 613), should be embodied in a formal, written decision rather than in a "mere statement."

The act of July 23, 1955, does not purport to set up an entirely new procedure but merely classifies the proceeding provided for as in the nature of an in rem proceeding, and in keeping provides for notice by publication.

Final Action to be Taken Under the Act of July 23, 1955, Where Proceedings on any Determination Area Have Been Concluded, M-36491 (Jan. 20, 1958)

By the provisions of the act of August 11, 1955 (69 Stat. 681; 30 U. S. C. sec. 623), as construed by the Solicitor in his opinion dated October 30, 1957 (M-36429, 64 I. D. 393), the owner of a mining claim located prior to the date of the act, upon lands within a power site which had been restored to mining location subject to section 24 of the Federal Power Act, is required to file a copy of the location notice in the appropriate land office within 1 year after the date of the act and failure to record the notice in the land office within the required time constitutes an invalidation of the claim and renders it null and void.

Where a mining claim is invalidated and rendered null and void for failure to comply with the provisions of section 4 of the act of August 11, 1955 (69 Stat. 681; 30 U. S. C. sec. 623), the subsequent action on behalf of the United States in exercising active control over the land within the former mining claim could not adversely affect any rights of the former mining claimant, and no title or possessory interest remains in the former mining claimant which could serve as a proper basis for a claim against the United States for damages to improvements.

Effect of the Act of August 11, 1955 (69 Stat. 681; 30 U. S. C. Sec. 623), M-36501 (Jan. 23, 1958) (Memorandum from Regional Solicitor, Sacramento, California, to Regional Director, Bureau of Reclamation, Sacramento, California, January 23, 1958.)

MINING CLAIMS--Continued

GENERALLY--Continued

An oil and gas lessee is not in the category of those who can and must file an adverse claim against a mining claim during the period of publication of notice of an application for patent to the mining claim.

Where a mineral claimant applies for a patent for land included within a prima facie valid oil and gas lease, the mineral entry cannot be allowed until the mineral applicant has established the validity of his claim in a contest brought against the oil and gas lease or at a hearing ordered by the Department at which the mineral claimant will have the burden of proof.

Where the records of the Department show a tract of land to be free from an adverse claim, an oil and gas lease issued for such land is prima facie valid even though it appears thereafter that a mineral location has previously been made on the tract.

Union Oil Company of California, Ramon P. Colvert, A-27532 (May 28, 1958) 65 I. D. 245

Where a mineral claimant applies for a patent for land included within a prima facie valid oil and gas lease, the mineral entry cannot be allowed until the mineral applicant has established the validity of his claim either in a contest brought against the oil and gas lease or at a hearing ordered by the Department at which the mineral claimant will have the burden of proof.

Duncan Miller, Union Oil Company of California, A-27727 (Dec. 9, 1958)

Where an adverse claim has been properly filed and there is a suit pending between the parties involving right of possession, patent proceedings will be stayed pending the outcome of the suit, whether the suit satisfies the requirements of Rev. Stat. 2326 or not, if the court's decision will aid the Department in the disposition of the patent application.

Where a suit between two mining claimants is instituted after a patent application has been filed by one claimant but prior to the filing of an adverse claim in the land office by the other claimant, all else being regular, it will be held to satisfy the requirement of Rev. Stat. 2326.

Victorville Lime Rock Co. et al., A-27796 (Jan. 30, 1959)

MINING CLAIMS--Continued

GENERALLY--Continued

An oil and gas lessee is not in the category of those who can and must file an adverse claim against a mining claim during the period of publication of notice of an application for patent to the mining claim.

Where a mineral claimant applies for a patent for land included within a prima facie valid oil and gas lease, the mineral entry cannot be allowed until the mineral applicant has established the validity of his claim in a contest brought against the oil and gas lease or at a hearing ordered by the Department at which the mineral claimant will have the burden of proof even though a final certificate has been inadvertently issued on the mineral entry.

Gabbs Exploration Company, United States Smelting Refining and Mining Company, A-27994 (Aug. 11, 1959)

The United States mining laws give to the locators and owners of mining claims as a necessary incident the right of ingress and egress across public lands to their claims for purposes of maintaining the claims and as a means toward removing the minerals.

The rights-of-way provided for in 43 CFR 115.154-179 for the Oregon and California Railroad and Reconveyed Coos Bay Grant lands were primarily for timber roads. Roads "acquired by the United States" as those words are used in those regulations, do not include roads constructed by others under statutory right for mining purposes.

Rights of Mining Claimants to Access Over Public Lands to Their Claims, M-36584 (Oct. 20, 1959) 66 I. D. 361

A small-tract applicant for land covered by a mining claim is not in a category of those who must file an adverse claim against the mining claim during the period of publication of notice of an application for patent to the mining claim.

United States v. The Dredge Corporation, A-28022 (Dec. 18, 1959)

COMMON IMPROVEMENTS

While it is permissible to allocate among a group of contiguous claims the value of improvements placed on one of the claims in the group,

COMMON IMPROVEMENTS--Continued

this can only be done where there is a showing that the labor performed or the improvements made on that claim were intended to aid in the development of all of the claims and that the labor and improvements are of such a character as to redound to the benefit of all.

United States v. C. F. Smith, A-27867 (Apr. 30, 1959) 66 I. D. 169

CONTESTS

Where all the factors establishing the invalidity of a mining claim are shown by the records of the Bureau of Land Management, it is not necessary to have a contest proceeding to hold the claims null and void.

R. J. Walter et al., A-27243 (Mar. 15, 1956)

An appeal to the Director of the Bureau of Land Management from a decision of the manager of a land office which is filed with the Director after the 30-day period allowed by the rules of practice applicable to Government contests against mining claims is not timely filed and the Director's action in dismissing such an appeal is proper.

United States v. Harry A. Schultz and Susann Schultz, A-27296 (June 27, 1956)

Where mining claimants contest the issuance of oil and gas leases and the filing of applications therefor, alleging the existence of prior valid mining claims, but it is impossible to identify the land covered by the mining claims from the land descriptions given in the notices to contest and in the location certificates of the claim and timely objection to the defective descriptions is made by the contestees, the contest proceedings can be dismissed for this reason alone.

Mining claimants who apply to contest oil and gas leases and applications for leases have the burden of showing the validity of their claims and must suffer the dismissal of their contests and the invalidation of their claims if they fail to sustain their burden.

Where contests by mining claimants have been dismissed by the Bureau of Land Management for failure to show a discovery, a rehearing will not be granted to permit the claimants to present evidence of discovery where such evidence was available at the time of the original hearing and the 38-year history of the claims shows laches on the part of the claimants in sustaining their claims.

CONTESTS--Continued

J. C. Nelson et al., A-27321 (Apr. 26, 1957) 64 I. D. 103

Where the rules of practice of the Department provide that a hearing in a Government contest may be waived if all parties consent, and it appears in a contest brought against a mining claim that the disputed questions of fact can be satisfactorily resolved only by holding a hearing, the Department will not accede to a waiver of a hearing and a hearing will be ordered.

United States v. Elbert M. Barron, A-27450 (Sept. 18, 1957) 64 I. D. 360

When the Government charges that no discovery has been made within a mining claim on land open to the operation of the mining laws, the contestee may show that discovery occurred after the contest was initiated, in the absence of a withdrawal of the land from the operation of the mining laws in the interim.

Where evidence introduced by the Government in a contest brought against the validity of a mining claim tends to show that no discovery has been made and where that evidence is supported by evidence of the contestee's witnesses and where the contestee has not been able to produce convincing evidence that a discovery has been made, the Government will prevail and the claim will be declared null and void.

United States v. Everett Foster et al., A-27421 (Jan. 8, 1958) 65 I. D. 1

Where a mining claimant contests oil and gas leases on the ground that land in the leases is covered by its mining claim and where at the hearing the mining claimant proves the validity of its claim and shows that the oil and gas leases extend over the claim, the mining claimant will prevail and the leases will be canceled to the extent of the conflict.

Union Oil Company of California v. Western Drilling and Producing Co. et al., A-27588 (July 14, 1958)

MINING CLAIMS--Continued

CONTESTS--Continued

The Director of the Bureau of Land Management has authority to remand a mining contest before him on appeal for the taking of additional evidence if he feels that the record is incomplete or that new developments may better reflect the facts upon which legal rights in question are predicated.

United States v. Vincent Creek Gold and Copper Company, A-27703 (Nov. 5, 1958)

Even though the Government does not sustain its charge, brought by way of contest, that the necessary patent improvements have not been placed on a claim, patent covering a relocated mining claim cannot issue until the applicant has submitted satisfactory proof that the required expenditure has been made on the claim since his relocation thereof.

United States v. C. F. Smith, A-27867 (Apr. 30, 1959) 66 I. D. 169

Where a mineral claimant applies for a patent for land included within a prima facie valid oil and gas lease, the mineral entry cannot be allowed until the mineral applicant has established the validity of his claim in a contest brought against the oil and gas lease or at a hearing ordered by the Department at which the mineral claimant will have the burden of proof even though a final certificate has been inadvertently issued on the mineral entry.

Gabbs Exploration Company, United States Smelting Refining and Mining Company, A-27994 (Aug. 11, 1959)

Where the Director of the Bureau of Land Management reverses the decision of a hearing examiner on the ground that material evidence was erroneously excluded from the hearing and that other evidence was improperly considered, and it appears that the former was not in fact excluded and that the latter was not considered, the case will be remanded to the Bureau for further consideration.

United States v. Charles R. Cartmel, A-28095 (Nov. 16, 1959)

In a contest against the validity of a mining claim, the claimant must show by a preponderance of the evidence that his claim is valid and if he does not, his claim is properly held invalid.

MINING CLAIMS--Continued

CONTESTS--Continued

In the absence of an extreme emergency, a motion for continuance first made at a hearing is properly denied since the Department's rules of practice require that it be made at least 10 days before the date of the hearing.

The United States must institute a contest against a mining claim for which an application for patent has been filed where it desires to challenge the claimant's assertion that a valid discovery has been made within the limits of the claim.

Small-tract applicants for lands covered by a prior mining claim may be allowed to intervene in a contest brought by the United States against the validity of the mining claim.

United States v. The Dredge Corporation, A-28022 (Dec. 18, 1959)

DETERMINATION OF VALIDITY

Where evidence at a hearing indicates that mining claims which were located in 1935 are not supported by a discovery of minerals, and the land on which the claims are situated was withdrawn from entry under the mining laws on June 29, 1936, the claims are properly declared null and void; but where the evidence is inconclusive as to whether a discovery was made on one claim before the withdrawal, that part of a decision holding such a claim null and void will be set aside and the case remanded for a further hearing on the issue of discovery.

United States v. Clyde W. Riggle et al., A-27184 (July 11, 1955)

In the determination of the validity of mining claims for sand and gravel and other low grade deposits, the governing factors must show that the deposit can be removed and marketed at a profit. The factors to be considered include, among others, the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand.

Use of Special Criteria to Determine the Mineral Character of Mining Claims Located for Sand and Gravel, M-36295 (Aug. 1, 1955)

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

A mining claim is a claim to property which may not be declared invalid without proper notice and adequate hearing and in accordance with due process of law although there is no statutory requirement that a hearing be held to determine the validity of such a claim.

United States v. Keith V. O'Leary et al., A-27260 (Sept. 28, 1956) 63 I. D. 341

Where land on which parts of several mining claims are located was not open to such location until after the locations were made so that the claims were invalid, but the claimants are given the opportunity to show whether a valid discovery has been made after the date when the land did become subject to mining location so as to show whether the claims may have been validated, the claims will be declared null and void where the showing of discovery made by the claimants is vague, inconclusive and insufficient and consists solely of a self-serving uncorroborated statement that a valid discovery was made.

United States v. Harry A. Schultz, A-27375 (Nov. 7, 1956)

Where a deposit of slate is shown to be not marketable, although it is of commercial quality, it is not a valuable mineral deposit and it is not subject to patent under the mining laws.

United States v. Estate of Victor E. Hanny, A-27362 (Nov. 9, 1956) 63 I. D. 369

Where a deposit of sandstone is shown not to have a present or prospective market value, it is not a valuable deposit within the mining law and a claim based on such a deposit is properly declared null and void.

United States v. George W. Black, A-27411 (Apr. 1, 1957) 64 I. D. 93

A mining claimant is not entitled to a hearing under the Administrative Procedure Act on the validity of the claim where it appears on the face of the record that the claim is invalid because the mining location was made at a time when the land included in the claim was embraced in an existing oil and gas lease issued under the terms of the Mineral Leasing Act, and the mining claimant had failed to comply with the provisions

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

of the act of August 12, 1953. United States v. Keith V. O'Leary et al., 63 I. D. 341 (1956), distinguished.

Clear Gravel Enterprises, Inc., A-27449 (May 31, 1957) 64 I. D. 210

An application for a mineral patent will be rejected and the mining claim declared null and void, where, although the claim may formerly have been valuable for minerals, it is not shown as a present fact that the claim is valuable for minerals.

Mining claims are properly declared null and void where the evidence shows that no valuable discovery has been made on the claims.

United States v. Alonzo A. Adams et al., A-27364 (July 1, 1957)

Insofar as a protest against an application for patent on a mineral entry asserts that a patent applicant has not complied with the law in any manner essential to a valid entry, the protest will be considered by the Department.

Seymour Gray et al. v. Milner Corporation, A-27431 (Aug. 21, 1957) 64 I. D. 337

No hearing is necessary to declare mining claims void ab initio where the records of the Department show that at the time of location of the claims the land was not open to such location.

The Dredge Corporation, A-27429 (Sept. 23, 1957) 64 I. D. 368

Where it appears that a mining claim previously held null and void for lack of discovery may have been validated by events occurring after the date of the contest hearing, the prior decision may be set aside and the matter remanded for a further hearing on the question of whether the later events have validated the claim.

United States v. Estate of Victor E. Hanny, A-27362 (Sept. 24, 1957)

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

In determining whether a mining claim is a valid claim, evidence detrimental to the contestee produced at the hearing through the examination and cross-examination of the contestee's witnesses may be considered.

United States v. Everett Foster et al., A-27421 (Jan. 8, 1958) 65 I. D. 1

Where land on which part of a mining claim is situated was not open to such location because an oil and gas lease covered such land, and where the claim was not validated under the act of August 12, 1953, the fact that the location notice was not recorded until after the oil and gas lease was canceled does not validate the portion of the claim which was not subject to mining entry when the attempted location was made.

Alex and Jessie Boyle, A-27518 (Jan. 17, 1958)

The fact that a mineral locator has filed an application for patent and paid the purchase price does not leave the Secretary of the Interior with only the ministerial function of issuing the patent, but the mining claim is subject to protest and contest to determine its validity.

Union Oil Company of California, Ramon P. Colvert, A-27532 (May 28, 1958) 65 I. D. 245

Where the evidence clearly shows lack of a discovery on a lode claim and that any possible prior discovery was made in material since mined out and the evidence does not establish the existence of a vein or lode on the claim, not only should an application for a patent to the claim be rejected but the claim should be declared null and void.

United States v. Estate of Richard R. Lakin, A-27572 (June 12, 1958)

The Department of the Interior has long recognized a distinction between two categories of cases involving the determination of validity of mining claims, the first category including cases where the validity of a claim turns on the legal effect to be given to facts of record (a question of law) and the second category consisting of cases where the validity of a claim depends upon the resolution of a factual issue (a question of fact). The Department has always held hearings in the second category of cases but not in the first category.

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

The Administrative Procedure Act does not require the holding of hearings in mining cases where the facts are not in dispute and the validity of a claim presents solely a legal issue; therefore a hearing is not required before holding mining claims to be null and void because at the time they were located the lands were included in outstanding small tract leases.

The Dredge Corporation, A-27429 (Supp.) (Aug. 14, 1958) 65 I. D. 336

When a deposit of limestone is shown not to have either a present or prospective market value, it is not a valuable deposit within the mining law and a claim based on such deposit is properly declared null and void.

United States v. J. R. Clements, A-27751 (Dec. 15, 1958)

Where in an appeal to the Secretary from a decision of the Director, Bureau of Land Management, holding certain mining claims null and void and rejecting application for patent of other claims, the appellants present assay reports and other information gathered after the Director's decision and not a part of the evidence adduced at a hearing, the evidence will be examined only to determine if it forms a sufficient basis for ordering a new hearing; it cannot become a basis for reversing the adverse decision as to the validity of the claims.

United States v. Albert Basil Capt et ux., A-27749 (Dec. 17, 1958)

Where in an appeal to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, holding mining claims null and void and rejecting patent application for the claims, the appellant presents assay reports not a part of the evidence adduced at a hearing, the evidence will be examined only to determine if it forms a sufficient basis for ordering a new hearing; it cannot become a basis for reversing the adverse decision as to the validity of the claims.

United States v. Maurice Constant, A-27779, (Dec. 30, 1958)

Deposits of gypsum which did not have a market value during the times when the lands containing the deposits were subject to location

DETERMINATION OF VALIDITY--Continued

under the mining law are not valuable deposits within the mining law, and claims containing such deposits are properly declared null and void.

United States v. G. C. (Tom) Mulkern, A-27746 (Jan. 19, 1959)

A decision declaring a mining claim null and void will be affirmed where the decision is based on substantial evidence submitted at a hearing held in accordance with the provisions of the Administrative Procedure Act and presided at by an examiner qualified under the act, and there was no error in the conduct of the proceeding or in the decision invalidating the claim.

United States v. Keith V. O'Leary et al., A-27791 (Jan. 21, 1959) 66 I. D. 17

An application for patent to a mining claim will be rejected and the claim declared null and void when, although valuable minerals may have been extracted in the past, it is not shown as a present fact that the claim is valuable for minerals.

Mining claims are properly declared null and void when the claimant fails to show that a valuable discovery has been made on each of the claims.

United States v. Eric North, A-27936 (Jul. 1, 1959)

Mining claims are properly declared null and void where the evidence shows that no valuable discovery has been made on the claim.

Alice H. Feighner, A-27937 (Jul. 1, 1959)

The validation of a placer mining claim will not be extended to a portion of the claim which the evidence shows to be nonmineral in character.

A mining claim which is properly found to be invalid for want of a discovery of any valuable mineral deposit is properly declared null and void; in appropriate instances, however, it is sufficient to reject an application for patent for want of discovery without declaring the claim null and void.

United States v. John R. and Pearl S. Dodson, A-27905 (Jul. 31, 1959)

DETERMINATION OF VALIDITY--Continued

A mining claim may properly be declared null and void when the evidence supports a finding that a valuable discovery has not been made on the claim.

United States v. Vestal L. Pearson, A-28005 (Aug. 17, 1959)

The sale of sand from a mining claim for use in making mortar in the construction of patios, fireplaces, and rock walls will not validate a mining claim where the market for the sand is limited to the near vicinity of the claim, only a small amount is sold, and no persuasive showing is made that a profit is realized from the sales.

The sale of sand from a mining claim for use in the construction of private roads and driveways cannot be used in determining the marketability of the deposit where ordinary earth, if available, could be used for the same purpose.

United States v. Quenton L. Brewer et al., A-27908 (Dec. 29, 1959)

DISCOVERY

It is not until minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with the reasonable prospect of success, in developing a valuable mine, that the requirement of discovery under the mining laws has been met.

The discovery required by the mining laws means more than a showing only of isolated bits of mineral not connected with or leading to substantial values.

To constitute a valid discovery upon a lode mining claim there must be exposed within the limits of the claim a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes.

Where an applicant for a mineral patent has shown no more than that it is possible to detect the presence of minerals in material taken from veins within the limits of a claim, the applicant has not met the requirements of the mining laws to entitle him to a patent.

United States v. Josephine Lode Mining and Development Company, A-27090 (May 11, 1955)

MINING CLAIMS--Continued

DISCOVERY--Continued

The discovery sufficient to validate a mining location for deposits of sand and gravel must include a showing that such deposits can be removed and marketed at a profit.

Use of Special Criteria to Determine the Mineral Character of Mining Claims Located for Sand and Gravel, M-36295 (Aug. 1, 1955)

To constitute a valid discovery upon a lode mining claim there must be exposed within the limits of the claim a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes.

It is not until minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with the reasonable prospect of success, in developing a valuable mine, that the requirement of discovery under the mining laws has been met.

Even though it is possible to detect the presence of minerals in samples taken from veins or stringers found within the limits of a lode mining claim, this does not constitute discovery under the mining laws.

United States v. Wilmot D. Everett et al., A-27010 (Supp.) (Oct. 17, 1955)

A mineral discovery made by the Geological Survey may not be adopted by a subsequent locator under the United States mining laws as a basis for his location at least where there has been no abandonment of the discovery wells by the Survey.

Virgin No. 3 Lode Claim; Whether Discovery Made by Geological Survey May be Adopted by Locator of a Mining Claim as a Discovery to Support the Location, M-36424 (Mar. 4, 1957)

Where a deposit of sandstone is shown not to have a present or prospective market value, it is not a valuable deposit within the mining law and a claim based on such a deposit is properly declared null and void.

United States v. George W. Black, A-27411 (Apr. 1, 1957) 64 I. D. 93

MINING CLAIMS--Continued

DISCOVERY--Continued

Recitals of discovery in notices of location are not evidence of discovery nor are affidavits of annual assessment work or notices of intention to hold claims in years when assessment work is not required.

J. C. Nelson et al., A-27321 (Apr. 26, 1957) 64 I. D. 103

To constitute a valid discovery upon a mining claim there must be a discovery of such a valuable deposit of mineral within the limits of the claim as would warrant a prudent man in the expenditure of his labor and means, with the reasonable prospect of success, in developing a valuable mine.

United States v. Alonzo A. Adams et al., A-27364 (July 1, 1957)

To satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit can be extracted, removed, and marketed at a profit.

When the Government charges that no discovery has been made within a mining claim on land open to the operation of the mining laws, the contestee may show that discovery occurred after the contest was initiated, in the absence of a withdrawal of the land from the operation of the mining laws in the interim.

Where evidence introduced by the Government in a contest brought against the validity of a mining claim tends to show that no discovery has been made and where that evidence is supported by evidence of the contestee's witnesses and where the contestee has not been able to produce convincing evidence that a discovery has been made, the Government will prevail and the claim will be declared null and void.

United States v. Everett Foster et al., A-27421 (Jan. 8, 1958) 65 I. D. 1

Where locators of a mining claim fail to prove that their claim is situated in a different position from that asserted by the Government in adversary proceedings against the validity of the claim and where the best evidence produced at the hearing is that the claim is situated as asserted by the Government and that no discovery of valuable mineral deposits had been made within the limits of the claim prior to the

MINING CLAIMS--Continued

DISCOVERY--Continued

withdrawal of the land from the operation of the mining laws, it is proper to hold the claim to be null and void.

United States v. Willard Christensen et al., A-27549 (May 14, 1958)

Where discovery of oil is made by an individual transferee of a placer mining claim located by several persons for more than 20 acres prior to March 2, 1911, the transferee is not, as he would be were the discovery made of another mineral, limited to the 20 acres surrounding the discovery point.

Union Oil Company of California v. Western Drilling and Producing Co. et al., A-27588 (July 14, 1958)

A showing of past production of a mineral substance of wide occurrence, such as pumice, without a showing that there is a present demand for the production is not sufficient to validate a mining claim located for that substance.

A showing of present production of a mineral substance of wide occurrence, such as pumice, without a concurrent showing that the production is being marketed at a profit is not sufficient to validate a mining claim located for that substance.

To satisfy the requirement of discovery on mining claims located for pumice, it must be shown that the deposit can be extracted, removed, and marketed at a profit.

United States v. Pumice Sales Corporation, and United States v. Crystalite Aggregates, A-27578 (July 28, 1958)

To satisfy the requirement of discovery on mining claims located for sand and gravel or limestone it must be shown that the deposits can be extracted, removed and marketed at a profit and where such a showing is not made the claims are properly declared null and void.

United States v. Francis N. Dlouhy et al., A-27668 (Sept. 24, 1958)

In the absence of a valid discovery within the meaning of the mining laws, the mere hope or expectation based upon a general belief that values increase with depth is not sufficient to validate a mining claim.

MINING CLAIMS--Continued

DISCOVERY--Continued

Where the alleged discovery in a mining claim consists only of an indication of tungsten and zirconium which of themselves do not warrant a reasonable man in the further expenditure of time and money with the reasonable prospect of success in an effort to develop a valuable mine, there has been no valid discovery of a valuable mineral deposit within the meaning of the mining laws.

United States v. Laura Duvall and Clifford F. Russell, A-27717 (Nov. 19, 1958) 65 I. D. 458

To satisfy the requirement of discovery on a placer mining claim located for clay, it must be shown that the deposit can be extracted, removed and marketed at a profit, and where the evidence is to the contrary the claim is properly declared null and void.

United States, Contestant v. John B. Kathe, Jr., Contestee, A-27744 (Nov. 19, 1958)

To satisfy the requirement of discovery on a placer mining claim located for limestone, it must be shown that the deposit can be extracted, removed and marketed at a profit and when such a showing is not made the claims are properly declared null and void.

United States v. J. R. Clements, A-27751 (Dec. 15, 1958)

Deposits of gypsum which did not have a market value during the times when the lands containing the deposits were subject to location under the mining law are not valuable deposits within the mining law, and claims containing such deposits are properly declared null and void.

United States v. G. C. (Tom) Mulkern, A-27746 (Jan. 19, 1959)

To constitute a valid discovery upon a lode mining claim there must be exposed within the limits of the claim a vein or lode of mineral-bearing rock in place which will warrant a reasonably prudent man in spending time and money with a reasonable prospect of developing a paying mine.

United States v. John Giulio, A-27842 (Feb. 6, 1959)

MINING CLAIMS--Continued

DISCOVERY--Continued

It is not error to give weight to the opinions expressed at a hearing on the validity of a mining claim where those opinions are supported by testimony from which the hearings officer could properly conclude that a discovery sufficient to validate the claim has been made.

Assays of samples taken from mining claims which show the presence of valuable minerals are proper evidence to be considered in arriving at a conclusion as to whether a prudent man would be justified in going ahead with the development of a mining claim.

The elements necessary to achieve a valid discovery in a lode claim under the mining laws are that there must be a vein or lode of quartz or other rock in place, that the quartz or other rock in place must carry some valuable mineral deposit, and that the two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a valuable mine.

United States v. C. F. Smith, A-27867 (Apr. 30, 1959) 66 I. D. 169

To satisfy the requirements of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit could prior to that date be extracted, removed and marketed at a profit, and where the evidence is to the contrary the claim is properly declared null and void.

United States v. P. D. Proctor et al., A-27899 (May 4, 1959)

A mere showing of the presence of minerals within the limits of a mining claim without a showing that the minerals have value does not meet the requirement of the mining laws that to validate a mining claim a discovery of a valuable mineral deposit within the limits of the claim must be made.

Julius R. Guglielmetti, A-27871 (May 13, 1959)

If the evidence fails to establish either the mineral nature of or the discovery of valuable mineral deposits in land classified as suitable for disposal to a State as school indemnity selection there is no basis for denying the State's right to acquire the land as an indemnity selection.

Augusta G. Stanley v. State of California, A-27928 (Jun. 15, 1959)

MINING CLAIMS--Continued

DISCOVERY--Continued

Mining claims are properly declared null and void when the claimant fails to show that a valuable discovery has been made on each of the claims.

United States v. Eric North, A-27936 (Jul. 1, 1959)

To constitute a valid discovery on a lode mining claim there must be a discovery on the claim of a lode or vein which would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

Alice H. Feighner, A-27937 (Jul. 1, 1959)

Discovery of a valuable mineral deposit upon a contested placer mining claim sufficient to justify the issuance of a patent is not established by evidence of mineral values obtained from samples taken from gravels extending into the claim from a worked-out deposit in another claim or from samples taken from tailings washed into the claim from another claim when the extension of the possible gold-bearing gravels and the volume of tailings therein is small.

Neither a presumption of discovery based upon the age of a placer mining claim and improvements thereon nor geological inference of a valuable mineral deposit therein arising from an assumption that an ancient channel containing mineral deposits similar to deposits found in adjoining claims also underlies the claim is sufficient to establish a discovery which will support an application for patent.

United States v. John R. and Pearl S. Dodson, A-27905 (Jul. 31, 1959)

The elements necessary to achieve a valid discovery in a lode claim under the mining laws are that there must be a vein or lode of quartz or other rock in place, that the quartz or other rock in place must carry gold or some other valuable mineral deposit, and that the two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a valuable mine.

United States v. Vestal L. Pearson, A-28005 (Aug. 17, 1959)

Proof of the presence of valuable deposits of minerals indicated by successful mining operations on lands surrounding a mining claim may raise a geological inference of the existence of valuable deposits on the claim but such inference cannot be accepted as a substitute for proof of actual discovery on the claim.

MINING CLAIMS--Continued

DISCOVERY--Continued

The elements necessary to achieve a valid discovery in a lode claim under the mining laws are that there must be a vein or lode of quartz or other rock in place, that the quartz or other rock in place must carry some valuable mineral deposit, and that the two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a valuable mine.

United States v. Bert Lee Doane, A-28094 (Oct. 30, 1959)

In a contest against the validity of a mining claim, the claimant must show by a preponderance of the evidence that his claim is valid and if he does not, his claim is properly held invalid.

To satisfy the requirements of discovery on a placer mining claim located for sand and gravel, it must be shown that the deposit can be extracted, removed, and marketed at a profit, and where the evidence is to the contrary, the claim is properly declared null and void.

United States v. The Dredge Corporation, A-28022 (Dec. 18, 1959)

To hold that a mining claim located for a common variety of sand and gravel prior to July 23, 1955, must be perfected by a discovery (including marketability) made before that date is not to give retrospective application to the act of July 23, 1955, which bars locations thereafter made for common varieties of sand and gravel.

To satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit can be extracted, removed, and marketed at a profit and where claimants fail to make that showing the claim is properly declared null and void.

Clear Gravel Enterprises, Inc., The Dredge Corporation, Inc., A-27967, A-27970 (Dec. 29, 1959)

To satisfy the requirements of discovery on a placer mining claim located for sand prior to July 23, 1955, it must be shown that the deposit could prior to that date be extracted, removed, and marketed at a profit, and where the claimants fail to make that showing the claim is properly declared null and void.

United States v. Quenton L. Brewer et al., A-27908 (Dec. 29, 1959)

MINING CLAIMS--Continued

LANDS SUBJECT TO

Lands which, in 1948 and 1949, were included in oil and gas leases or allowable applications for such leases under the Mineral Leasing Act were not subject to mining location and in the absence of a showing of compliance with the provisions of the act of August 12, 1953, mining claims located on such lands in those years are invalid.

R. L. Greene et al., A-27181 (May 11, 1955)

Sand and gravel and other low grade rock materials which are of such quality and quantity that they can be used only for "filling" purposes are not subject to location and patent under the mining laws. "Blow sand" and other materials on public lands used principally for agricultural and horticultural purposes are not subject to entry and patent under the mining laws.

Use of Special Criteria to Determine the Mineral Character of Mining Claims Located for Sand and Gravel, M-36295 (Aug. 1, 1955)

Lands which, in 1946, were included in oil and gas leases issued under the Mineral Leasing Act were not subject to mining location and in the absence of a showing of compliance with the provisions of the act of August 12, 1953, mining claims located on such lands are invalid.

Clear Gravel Enterprises, Inc., A-27287 (Mar. 27, 1956)

Metalliferous mining locations could be made within petroleum reserves prior to the act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 181), even if the land was then known to contain oil or gas. After that enactment and prior to the enactment of the acts of August 12, 1953 (Public Law 250; 67 Stat. 539), and August 13, 1954 (Public Law 585; 68 Stat. 708), lands valuable for oil or gas were not subject to location under the United States mining laws. But only lands known to contain those minerals were excluded from location for metalliferous minerals.

Metalliferous Mining Locations Within a Petroleum Reserve, M-36375 (May 3, 1956) 63 I. D. 346

Lands acquired for National forests under the General Exchange Act of March 20, 1922 (42 Stat. 465), have the status of public lands of the United States and are therefore subject

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

to entry under the general mining laws. Lands acquired under the Bankhead-Jones Farm Tenant Act (7 U.S.C. secs. 1001 et seq.) whether or not embraced within National forests are not subject to location under the mining laws.

Applicability of the General Mining and Mineral Leasing Laws to Lands Acquired for National Forests, M-36421 (Feb. 18, 1957)

Land which, in 1946, was included in an oil and gas lease issued under the Mineral Leasing Act was not subject to mining location and in the absence of a showing of compliance with the provisions of the act of August 12, 1953, a mining claim located on such land is invalid.

Clear Gravel Enterprises, Inc., A-27449 (May 31, 1957) 64 I. D. 210

Land which, in 1952, was included in an oil and gas lease issued under the Mineral Leasing Act was not subject to mining location and in the absence of a showing of compliance with the provisions of the act of August 12, 1953, a mining claim located on such land is invalid.

Edith F. Allen, A-27455 (July 16, 1957)

Land included in oil and gas leases under the Mineral Leasing Act in 1952 was not then subject to mining location and, in the absence of a showing of compliance with the provisions of the act of August 12, 1953, mining claims located on such land in that year are invalid.

Land under lease or patent pursuant to the Small Tract Act is not open to location under the mining laws.

A locator of a mining claim does not acquire any property right by virtue of his location if the location is made on land not subject to appropriation.

The Dredge Corporation, A-27429 (Sept. 23, 1957) 64 I. D. 368

Lands which, in 1952, were included in oil and gas leases issued under the Mineral Leasing Act were not subject to mining location and in the absence of a showing of compliance with the provisions of the act of August 12, 1953, mining claims located on such lands are invalid.

Daniel H. and Eula Turnbaugh, Edith F. Allen, A-27475 (Sept. 23, 1957)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

A mineral location made on land included within a power site reserve confers no rights upon the locator or his successor in interest.

John Rovetto, A-27521 (Dec. 9, 1957)

An oil and gas lease issued under the Mineral Leasing Act on November 1, 1948, and in full force and effect on October 8, 1951, precluded the location on that date of a mining claim on the land which it covered even though the lessee was then in default and the lease was later canceled on November 20, 1951; and a mining location made on the land included in the lease prior to the cancellation of the lease was invalid unless the owners of the claim subsequently complied with the requirements of the act of August 12, 1953, for validating such a claim.

Alex and Jessie Boyle, A-27518 (Jan. 17, 1958)

Prior to passage of the act of August 11, 1955, lands embraced in an existing power-site withdrawal were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power-site purposes, but prior to passage of the act, is null and void where the land embraced in the claim had not been restored to entry under section 24 of the Federal Power Act at the time of location.

Day Mines, Inc., A-27553 (Mar. 28, 1958) 65 I. D. 145

The act of August 11, 1955, the Mining Claims Rights Restoration Act of 1955, did not open to mining location land which was previously withdrawn or reserved for power development or power sites and which, in addition, was withdrawn for reclamation purposes.

Mining claims located on land withdrawn for power site purposes are null and void where such locations were made prior to the act of August 11, 1955.

Neither the Atomic Energy Act of 1946 nor the Atomic Energy Act of 1954 restored to the operation of the mining laws lands previously reserved or withdrawn from the operation of those laws.

A. W. Kimball et al., A-27526 (Apr. 21, 1958) 65 I. D. 166

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

Prior to passage of the act of August 11, 1955, lands embraced in power site withdrawals were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power site purposes but prior to passage of the act of August 11, 1955, is null and void unless the land embraced in the claim was restored to entry under section 24 of the Federal Power Act at the time of location.

A mining claim is properly declared null and void where the location was made at a time when the land embraced in the claim was included in a proposed withdrawal of the land which would exclude location under the mining laws, and where notice of the proposed withdrawal was recorded on the serial register and tract books of the land office--the notation having the effect of segregating the lands included in the proposed withdrawal from location under the mining laws to the extent that the withdrawal, if effected, would prevent such disposal.

Mrs. Ethel H. Myers, A-27560 (May 5, 1958)
65 I. D. 207

Land included in an oil and gas lease under the Mineral Leasing Act in 1952 was not then subject to mining location and, in the absence of a showing of compliance with the provisions of the act of August 12, 1953, mining claims located on such land in that year are void.

Where amended notices of location of mining claims, located in 1952 on land which at the time was included in an oil and gas lease under the Mineral Leasing Act, are not filed until December 9, 1954, the filings are not timely and such mining claims are not entitled to the benefits of the acts of August 12, 1953, and August 13, 1954.

United States v. R. B. Borders, et al., A-27493 (May 16, 1958)

Acquired lands of the United States which were acquired under the provisions of the Bankhead-Jones Farm Tenant Act of July 22, 1937, are not subject to location under the mining laws of the United States, and mining claims located on such lands are null and void.

I. B. Griffith et al., A-27615 (July 24, 1958)

A material site permit issued under the Federal Highway Act to the Colorado State Highway Department precludes the subsequent location of a placer mining claim on the same land, and a mining claim located on the land embraced in the permit is properly declared null and void.

Gifford Allen, A-27641 (Aug. 11, 1958)

An attempt to locate a mining claim made while the land is included in an application to withdraw the land from location or entry under the general mining laws for the use of a Federal agency is invalid since the notation of the filing of the application on the land office records segregates the land from lands available for disposal under the public land laws to the extent that the proposed withdrawal would.

Lands in power site withdrawals were not open to location of mining claims until the adoption of the Mining Claims Rights Restoration Act of 1955 on August 11, 1955, and any attempted location before that time subsequent to the withdrawal of the land for power site purposes is null and void.

Marion Q. Kaiser, Charles C. Kaiser, A-27691 (Nov. 25, 1958) 65 I. D. 485

Placer mining claims are properly declared null and void if, at the time adverse proceedings are brought against the claims, it is shown that the lands involved are classified as coal lands and were so classified when the locations were made, in the absence of a substantial showing that the coal land classification is erroneous.

United States v. Maurice Constant, A-27779, (Dec. 30, 1958)

Mining claims located in 1947, at a time when the lands applied for were embraced in an outstanding oil and gas lease issued pursuant to the Mineral Leasing Act, are invalid in the absence of a showing of compliance with act of August 12, 1953, and it is immaterial that the lease may later be determined to have been improperly issued because at the time of issuance there were valid mining claims on the lands.

A. V. Toolson et al., A-27595 (Feb. 18, 1959)
66 I. D. 48

A mining claim which is null and void at its inception because the land is embraced in an existing power-site withdrawal cannot subsequently be validated as of the date of the original

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

location by relocation after the land is opened to mining location under section 24 of the Federal Power Act.

The act of August 11, 1955, does not operate retroactively to validate mining claims which were void at their inception nor to permit retroactive relocation of claims which were void because the lands included therein were withdrawn for a power site at the time of the original location.

Howard W. Balsley, A-27920 (Jun. 15, 1959)

Sand and gravel deposits covered by a purchase application filed under the Materials Act are subject to location if the deposits are not common varieties of sand and gravel and a profitable market therefor exists.

Conflict of Purchase Application and Contract Under the Materials Act With a Placer Mining Location, M-36581 (Sept. 25, 1959)

Mining claims are null and void where the claims were purportedly located at various times between 1949 and 1953 on lands which were included in oil and gas leases or an application therefor when the attempted locations were made, and the requirements of the acts of August 12, 1953, and August 13, 1954, under which the claims might have been validated, have not been met.

Mesilla Valley Construction Company et al., A-28102 (Nov. 20, 1959)

LOCATION

Soil and Moisture projects for experimental purposes as an aid to the administration of other lands are excepted from mining location since they are appropriated for a public use.

Conflict of Mining Claims with Existing and Proposed Soil and Moisture Projects, M-36301 (Oct. 20, 1955)

Where lands within a reclamation withdrawal are conditionally restored to mineral location under the act of April 23, 1932 (47 Stat. 136, 137; 43 U.S.C. sec. 154 (1952)), and one of the conditions is that a contract if required by the United States as a condition precedent to the vesting of any rights in the locator is to be re-

MINING CLAIMS--Continued

LOCATION--Continued

corded in the local county records office pursuant to the act of April 23, 1932, supra, that condition is in addition to those of section 2324, Revised Statutes (1875), and a statement that such a contract has been entered into and recorded separately may be required of the locator to be incorporated in the certificate of location although the particular State statute defining the contents of the certificate of location does not provide for such a provision. There is no rule requiring that the certificate of location, which is a creature of State law, be filed in the local land office, but as a practical matter, incorporation of both the contract and the certificate of location into one instrument appears to be desirable for the locator.

Legality of Stipulations Required by the Bureau of Land Management Pursuant to the act of April 23, 1932 (47 Stat. 136, 137; 43 U.S.C. sec. 154 (1952)), Upon the Conditional Restoration of Lands Withdrawn Under the Reclamation Laws to Mineral Location, M-36404 (Jan. 7, 1957)

The fact that a United States deputy mineral surveyor performed the work of locating a claim for a patent applicant does not, in the absence of evidence that at the time of location the surveyor had, or has since acquired, an interest in the land, make the location void by reason of section 452 of the Revised Statutes which prohibits the purchase or acquisition of interests in the purchase of public lands by officers, clerks, and employees of the General Land Office.

Seymour Gray et al. v. Milner Corporation, A-27431 (Aug. 21, 1957) 64 I. D. 337

Where an association placer mining claim for more than 20 acres passes into the sole control of one locator prior to discovery, the location, upon later discovery, is valid for only 20 acres.

United States v. Estate of Victor E. Hanny, A-27362 (Sept. 24, 1957)

Where land on which part of a mining claim is situated was not open to such location because an oil and gas lease covered such land, and where the claim was not validated under the act of August 12, 1953, the fact that the location notice was not recorded until after the oil and gas lease was canceled does not validate the portion of the claim which was not subject to mining entry when the attempted location was made.

Alex and Jessie Boyle, A-27518 (Jan. 17, 1958)

MINING CLAIMS--Continued

LOCATION--Continued

Prior to the enactment of the act of July 23, 1955 (69 Stat. 367; 30 U. S. C., 1952 ed., Supp. IV, sec. 601), no right-of-way across a valid, unpatented mining claim which would continue after patent could be initiated solely through construction by the United States. The act above cited, which reserved to the United States the right of access across unpatented mining claims, was limited in its effect to the period "prior to the issuance of patent" to the claim and cannot be construed to authorize such access across such a claim after issuance of patent.

Access Road Construction--Effect of Waivers and Determinations Given Under Public Law 167, 84th Congress, M-36493 (Apr. 23, 1958)
65 I. D. 200

Where locators of a mining claim fail to prove that their claim is situated in a different position from that asserted by the Government in adversary proceedings against the validity of the claim and where the best evidence produced at the hearing is that the claim is situated as asserted by the Government and that no discovery of valuable mineral deposits had been made within the limits of the claim prior to the withdrawal of the land from the operation of the mining laws, it is proper to hold the claim to be null and void.

United States v. Willard Christensen et al., A-27549 (May 14, 1958)

A mining claimant who has submitted an application for patent based upon claims located in 1947 may not change the date of the locations in his application to that of his alleged predecessors in interest at an earlier time, upon a determination by the Government that the 1947 locations were invalid as a matter of law because the lands were not open to mining location, but must resubmit his application on the basis of the prior locations.

A. V. Toolson et al., A-27595 (Feb. 18, 1959)
66 I. D. 48

Consistent with the rule long sanctioned by the Courts and the Department that mining locations may be made over right-of-way easements, such locations may be made over highway rights-of way acquired under the act of November 9, 1921, as amended, which grants an easement.

A material site under that act is more in the nature of a profit than an easement and is not subject to the same rule, because it confers the right to take and remove a part of the realty which is inconsistent with the rights inuring to the locator of a mining claim.

Mining Locations on Federal Aid Rights-of-Way, M-36554 (Mar. 24, 1959)

MINING CLAIMS--Continued

LOCATION--Continued

Where a mining claim is located on land which is subsequently withdrawn for powersite purposes, an amendment of the location following the withdrawal does not vitiate the claim.

Harold Dale, A-28105 (Nov. 19, 1959)

To hold that a mining claim located for a common variety of sand and gravel prior to July 23, 1955, must be perfected by a discovery (including marketability) made before that date is not to give retrospective application to the act of July 23, 1955, which bars locations thereafter made for common varieties of sand and gravel.

Clear Gravel Enterprises, Inc., The Dredge Corporation, Inc., A-27967, A-27970 (Dec. 29, 1959)

LODE CLAIMS

Where the evidence clearly shows lack of a discovery on a lode claim and that any possible prior discovery was made in material since mined out and the evidence does not establish the existence of a vein or lode on the claim, not only should an application for a patent to the claim be rejected but the claim should be declared null and void.

United States v. Estate of Richard R. Lakin, A-27572 (June 12, 1958)

MILL SITES

Where the locators of a mill site claim have not erected any buildings useful for mining or milling on the claim or made any other use of the claim, except to remove tailings left from previous operations, and have held the claim for over 6 years and have only vague plans for use years in the future, the land is not being used for mining and milling purposes within the mill site statute and the location is properly held null and void.

United States v. William Herron and John Herron, A-27414 (Mar. 18, 1957)

MILL SITES--Continued

Section 4 of the act of July 23, 1955 (69 Stat. 368; 30 U.S.C. sec. 612), is applicable to valid mill site locations made after the act. The restrictions and limitations of section 4 are applicable to valid mill site locations made prior to the act only if in accordance with section 6 thereof the owners waive and relinquish all rights in conflict with those restrictions and limitations. The owner of a valid mill site location may cut and remove the timber on the claim for the purpose of constructing thereon a mill, reduction works, tramway, or other accessories required in the development of his mineral interests but he may not cut the timber for the purpose of selling it.

Effect of Section 4 of the Act of July 23, 1955 (69 Stat. 368; 30 U.S.C. sec. 612), on Mill Site Locations--Timber on Mill Sites, M-36451 (July 22, 1957) 64 I. D. 301

A mill site which is not used for mining or milling purposes in connection with a lode claim and which does not contain a quartz mill or reduction works is invalid.

A mill site which is used solely in connection with placer claims is invalid.

United States v. Laura Duvall and Clifford F. Russell, A-27717 (Nov. 19, 1958) 65 I. D. 458

MINERAL SURVEYS

If a deputy mineral surveyor of the United States who executed the survey for patent on a mining claim was one of the two witnesses signing the affidavit required by statute and regulation for proof of posting on the claim of the plat and notice of intention to apply for patent, the patent application will be rejected, unless a supplemental affidavit by a proper witness is furnished, because regulatory provisions that the surveyor of a mining claim will not be allowed to prepare for the claimant papers in support of the application and that the surveyor must have absolutely nothing to do with the case except in his official capacity as surveyor disqualify the surveyor as a witness of posting for the patent applicant.

Seymour Gray et al. v. Milner Corporation, A-27431 (Aug. 21, 1957) 64 I. D. 337

PATENT

An application for a patent to a mining claim must be rejected where portions of the claim, including the point of discovery, comprise part of a tract which has long since been patented by the United States.

Newton's Fork Gold Mining Company, A-27109 (April 27, 1955)

No patent for a lode mining claim may be granted until there has been a discovery of valuable mineral deposits within the limits of the claim.

Where an applicant for a mineral patent has shown no more than that it is possible to detect the presence of minerals in material taken from veins within the limits of a claim, the applicant has not met the requirements of the mining laws to entitle him to a patent.

United States v. Josephine Lode Mining and Development Company, A-27090 (May 11, 1955)

Where a patent contains a reservation of all minerals under a law providing for such a reservation but containing no authorization for the disposal of the minerals, mining claims cannot be located for the reserved minerals since the United States mining laws apply only to minerals in lands belonging to the United States.

Applicability of 43 CFR 199.40-199.56 Authorizing Mineral Disposal in Certain Lands to Lands Acquired by the City and County of Denver, Colorado, Under the act of August 25, 1914 (38 Stat. 706), M-36279 (July 19, 1955)

Failure to file an adverse claim against an application for a patent on a mining claim within the 60-day publication period required by section 2325 of the Revised Statutes amounts to a waiver of the adverse claim, and to the extent that a protest against issuance of a patent on a mineral entry is an adverse claim it will not be considered as an adverse claim unless filed within the required time.

A suit pending in a State court based upon an asserted prior appropriation of a mining claim and amounting to an adverse claim against an application for mineral patent is not a judicial proceeding under section 2326 of the Revised Statutes which will stay action of the Department

PATENT--Continued

on the application for patent where the adverse claim was not filed in the land office within the time required by statute.

Seymour Gray et al. v. Milner Corporation, A-27431 (Aug. 21, 1957) 64 I. D. 337

Prior to the enactment of the act of July 23, 1955 (69 Stat. 367; 30 U. S. C., 1952 ed., Supp. IV, sec. 601), no right-of-way across a valid, unpatented mining claim which would continue after patent could be initiated solely through construction by the United States. The act above cited, which reserved to the United States the right of access across unpatented mining claims, was limited in its effect to the period "prior to the issuance of patent" to the claim and cannot be construed to authorize such access across such a claim after issuance of patent.

Access Road Construction--Effect of Waivers and Determinations Given Under Public Law 167, 84th Congress, M-36493 (Apr. 23, 1958) 65 I. D. 200

Action on an application for patent to mining claims will be suspended where an adverse claim is filed by one claiming a prior mining location on the same land.

United States v. R. B. Borders, et al., A-27493 (May 16, 1958)

Where the evidence clearly shows lack of a discovery on a lode claim and that any possible prior discovery was made in material since mined out and the evidence does not establish the existence of a vein or lode on the claim, not only should an application for a patent to the claim be rejected but the claim should be declared null and void.

United States v. Estate of Richard R. Lakin, A-27572 (June 12, 1958)

An application for a patent to a lode mining claim is properly rejected where there is no evidence of a valid discovery of a valuable mineral on the claim, but the claim need not be declared invalid and the claimant may remain in possession of the claim so long as he is diligently engaged in seeking a discovery where there is an indication that there may be some mineral values on the claim.

United States v. John Giulio, A-27842 (Feb. 6, 1959)

MINING CLAIMS--Continued

PATENT--Continued

A mining claimant who has submitted an application for patent based upon claims located in 1947 may not change the date of the locations in his application to that of his alleged predecessors in interest at an earlier time, upon a determination by the Government that the 1947 locations were invalid as a matter of law because the lands were not open to mining location, but must resubmit his application on the basis of the prior locations.

A. V. Toolson et al., A-27595 (Feb. 18, 1959) 66 I. D. 48

An application for patent of lode and placer claims is properly rejected where the evidence does not disclose the existence of valid discoveries on the claims at the present time and discloses that any possible prior discoveries were made in material since mined out.

It is the duty of an applicant for a mining patent to keep discovery points available for inspection by the Government mineral examiners.

United States v. Lem A. and Elizabeth D. Houston, A-27846 (Apr. 29, 1959) 66 I. D. 161

No patent for a lode mining claim may be granted until there has been a discovery of valuable mineral deposits within the limits of the claim.

Julius R. Guglielmetti, A-27871 (May 13, 1959)

An application for patent to a mining claim will be rejected and the claim declared null and void when, although valuable minerals may have been extracted in the past, it is not shown as a present fact that the claim is valuable for minerals.

United States v. Eric North, A-27936 (Jul. 1, 1959)

An application for patent for a placer claim is properly rejected where the evidence does not disclose the existence of valid discoveries in the claim at the present time.

United States v. John R. and Pearl S. Dodson, A-27905 (Jul. 31, 1959)

MINING CLAIMS--Continued

PATENT--Continued

An application for a mineral patent should be rejected for lands it covers to which the applicant does not have full title.

Gabbs Exploration Company, United States Smelting Refining and Mining Company, A-27994 (Aug. 11, 1959)

An application for patent on a mining claim is properly rejected when the evidence introduced in a contest hearing fails to disclose a present discovery of a valuable mineral deposit.

United States v. Bert Lee Doane, A-28094 (Oct. 30, 1959)

PATENT IMPROVEMENTS

Annual assessment work and acceptable patent expenditures must be performed for the benefit of the claim or claims to which their application is sought by the locator or by those in privity of title under section 2325, Revised Statutes (1875) (30 U.S.C. sec. 29 (1952)).

Where the failure to validate or correct deficiencies in invalid mining locations does not result from any fault of the locators but from inadequate records in the Bureau of Land Management, there are strong reasons why, if otherwise legally possible, the equities of the locators should be recognized and that if the right to patent can be established under section 2332, Revised Statutes (1875) (30 U.S.C. sec. 38 (1952)), the annual assessment work and acceptable patent expenditures performed for the benefit of such claims during the time when the right to the claims accrued under section 2332, Revised Statutes (1875) are properly credited thereto.

Annual Assessment Work and Acceptable Patent Improvements Performed for the Benefit of Mining Claims During the Period of Time When the Right to Patent Accrues Under Section 2332, Revised Statutes (1875) (30 U.S.C. sec. 38 (1952)), M-36388 (Nov. 13, 1956)

Even though the Government does not sustain its charge, brought by way of contest, that the necessary patent improvements have not been placed on a claim, patent covering a relocated mining claim cannot issue until the applicant has submitted satisfactory proof that the required expenditure has been made on the claim since his relocation thereof.

MINING CLAIMS--Continued

PATENT IMPROVEMENTS--Continued

Affidavits and other statements with respect to the value of improvements given by witnesses for an applicant for a mineral patent are not conclusive on the Government.

Roadways and buildings must be excluded from the estimated value of patent improvements unless it is clearly shown that they are associated with actual excavations, are essential to the practical development of the claim, and actually facilitate the extraction of minerals from the claim.

Upon application for patent a relocator will not be permitted to include in his estimate of the value of the improvements required by law to be made as a condition precedent to patent any of the labor done or improvements made by the original locator.

United States v. C. F. Smith, A-27867 (Apr. 30, 1959) 66 I. D. 169

PLACER CLAIMS

Where discovery of oil is made by an individual transferee of a placer mining claim located by several persons for more than 20 acres prior to March 2, 1911, the transferee is not, as he would be were the discovery made of another mineral, limited to the 20 acres surrounding the discovery point.

Union Oil Company of California v. Western Drilling and Producing Co. et al., A-27588 (July 14, 1958)

POSSESSORY RIGHT

Where the record of an application for patent on mining claims indicates that the claims were located in 1948 on lands open to mining location and that the claims are valid, oil and gas leases issued for land included in the claims are properly canceled to the extent that they conflict with such locations where the applications for the leases were filed several years after the mining claims were located.

Marion F. Jensen et al., Elden F. Keith et al., A-27254, A-27256, A-27257 (Feb. 24, 1956) 63 I. D. 71

MINING CLAIMS--Continued

POSSESSORY RIGHT--Continued

Actual possession under color of right for the complete period of the State's statute of limitations governing adverse possession of mining claims, following a discovery of valuable minerals, is sufficient to establish a valid mining claim, absent adverse locators, good against all but the United States under section 2332, Revised Statutes (1875) (30 U.S.C. sec. 38 (1952)).

Annual Assessment Work and Acceptable Patent Improvements Performed for the Benefit of Mining Claims During the Period of Time When the Right to Patent Accrues Under Section 2332, Revised Statutes (1875) (30 U.S.C. sec. 38 (1952)), M-36388 (Nov. 13, 1956)

Failure to file an adverse claim against an application for a patent on a mining claim within the 60-day publication period required by section 2325 of the Revised Statutes amounts to a waiver of the adverse claim, and to the extent that a protest against issuance of a patent on a mineral entry is an adverse claim it will not be considered as an adverse claim unless filed within the required time.

Seymour Gray et al. v. Milner Corporation, A-27431 (Aug. 21, 1957) 64 I. D. 337

Where a mining claim is invalidated and rendered null and void for failure to comply with the provisions of section 4 of the act of August 11, 1955 (69 Stat. 681; 30 U.S.C. sec. 623), the subsequent action on behalf of the United States in exercising active control over the land within the former mining claim could not adversely affect any rights of the former mining claimant, and no title or possessory interest remains in the former mining claimant which could serve as a proper basis for a claim against the United States for damages to improvements.

Effect of the Act of August 11, 1955 (69 Stat. 681; 30 U.S.C. Sec. 623), M-36501 (Jan. 23, 1958) (Memorandum from Regional Solicitor, Sacramento, California, to Regional Director, Bureau of Reclamation, Sacramento, California, January 23, 1958.)

Action on an application for patent to mining claims will be suspended where an adverse claim is filed by one claiming a prior mining location on the same land.

United States v. R. B. Borders, et al., A-27493 (May 16, 1958)

MINING CLAIMS--Continued

POSSESSORY RIGHT--Continued

Possession of the surface of the land included in an unpatented mining claim does not permit the locator to use the mining claim for grazing purposes or to grant this privilege to others.

James G. Brown, M. H. Young, A-27635 (Sept. 24, 1958) 65 I. D. 394

SPECIAL ACTS

Lands which, in 1948 and 1949, were included in oil and gas leases or allowable applications for such leases under the Mineral Leasing Act were not subject to mining location and in the absence of a showing of compliance with the provisions of the act of August 12, 1953, mining claims located on such lands in those years are invalid.

R. L. Greene et al., A-27181 (May 11, 1955)

Lands which, in 1946, were included in oil and gas leases issued under the Mineral Leasing Act were not subject to mining location and in the absence of a showing of compliance with the provisions of the act of August 12, 1953, mining claims located on such lands are invalid.

Clear Gravel Enterprises, Inc., A-27287 (Mar. 27, 1956)

Public Law 167, 84th Cong. (69 Stat. 367), did not, of itself, open the surface of unpatented mining claims to the general public for recreational purposes, though, pursuant to the act, an agency having other authority to administer lands of the United States for those purposes and permit their use by the general public, may properly extend its jurisdiction to such areas.

Public Law 167, 84th Cong. (69 Stat. 367), did not, of itself, open the surface of unpatented mining claims to the general public for access to adjacent lands for recreational purposes, though an agency having authority to administer adjacent lands for recreational or any other authorized purpose or use, may, pursuant to the terms of the act, grant access rights across any unpatented mining claims subject to its limitations to "permittees or licensees" entitled or required to have such rights.

Effect of Public Law 167, 84th Cong., on the Use of the Surface of Unpatented Mining Claims for Recreational Purposes and for Access to Adjacent Lands, M-36389 (Dec. 7, 1956)

MINING CLAIMS--Continued

SPECIAL ACTS--Continued

Land which, in 1946, was included in an oil and gas lease issued under the Mineral Leasing Act was not subject to mining location and in the absence of a showing of compliance with the provisions of the act of August 12, 1953, a mining claim located on such land is invalid.

Clear Gravel Enterprises, Inc., A-27449 (May 31, 1957) 64 I. D. 210

Land which, in 1952, was included in an oil and gas lease issued under the Mineral Leasing Act was not subject to mining location and in the absence of a showing of compliance with the provisions of the act of August 12, 1953, a mining claim located on such land is invalid.

Edith F. Allen, A-27455 (July 16, 1957)

Land included in oil and gas leases under the Mineral Leasing Act in 1952 was not then subject to mining location and, in the absence of a showing of compliance with the provisions of the act of August 12, 1953, mining claims located on such land in that year are invalid.

The Dredge Corporation, A-27429 (Sept. 23, 1957) 64 I. D. 368

Lands which, in 1952, were included in oil and gas leases issued under the Mineral Leasing Act were not subject to mining location and in the absence of a showing of compliance with the provisions of the act of August 12, 1953, mining claims located on such lands are invalid.

Daniel H. and Eula Turnbaugh, Edith F. Allen, A-27475 (Sept. 23, 1957)

The only reasonable interpretation of section 2 of Public Law 522, 84th Congress, 2d Session (70 Stat. 156) insofar as valid mining claims are concerned seems to be that "subject to" means excluded from the conveyance.

Public Law 522, 84th Congress, 2d Session (70 Stat. 156), and Application of the Townsite Laws (43 U. S. C. secs. 711-728; 43 CFR 255. 9-255. 54), M-36486 (Oct. 30, 1957)

MINING CLAIMS--Continued

SPECIAL ACTS--Continued

An oil and gas lease issued under the Mineral Leasing Act on November 1, 1948, and in full force and effect on October 8, 1951, precluded the location on that date of a mining claim on the land which it covered even though the lessee was then in default and the lease was later canceled on November 20, 1951; and a mining location made on the land included in the lease prior to the cancellation of the lease was invalid unless the owners of the claim subsequently complied with the requirements of the act of August 12, 1953, for validating such a claim.

Alex and Jessie Boyle, A-27518 (Jan. 17, 1958)

Neither the Atomic Energy Act of 1946 nor the Atomic Energy Act of 1954 restored to the operation of the mining laws lands previously reserved or withdrawn from the operation of those laws.

The act of August 11, 1955, the Mining Claims Rights Restoration Act of 1955, did not open to mining location land which was previously withdrawn or reserved for power development or power sites and which, in addition, was withdrawn for reclamation purposes.

Mining claims located on land withdrawn for power site purposes are null and void where such locations were made prior to the act of August 11, 1955.

A. W. Kimball et al., A-27526 (Apr. 21, 1958) 65 I. D. 166

Land included in an oil and gas lease under the Mineral Leasing Act in 1952 was not then subject to mining location and, in the absence of a showing of compliance with the provisions of the act of August 12, 1953, mining claims located on such land in that year are void.

Where amended notices of location of mining claims, located in 1952 on land which at the time was included in an oil and gas lease under the Mineral Leasing Act, are not filed until December 9, 1954, the filings are not timely and such mining claims are not entitled to the benefits of the acts of August 12, 1953, and August 13, 1954.

United States v. R. B. Borders, et al., A-27493 (May 16, 1958)

Verified statements required under the act of July 23, 1955, are properly rejected and the use of surface resources denied to the mining

claimants when such statements are filed after termination of the period of 150 days prescribed by the statute for filing such statements.

Hines Gilbert Gold Mines Company, A-27732 (Nov. 13, 1958) 65 I. D. 481

Where the deposits for which a mining claim has been located are a common variety of sand or stone, are of widespread occurrence, and are the country rock of the area, they are materials which the act of July 23, 1955, has removed from the category of valuable mineral deposits locatable under the mining laws and the fact that they, in common with all similar materials, may be of use and value for commercial purposes does not exempt them from the stricture of the statute.

United States v. Laura Duvall and Clifford F. Russell, A-27717 (Nov. 19, 1958) 65 I. D. 458

Where a mining claimant whose verified statement, filed pursuant to section 5 of the act of July 23, 1955, for the purpose of asserting rights to the surface resources on his mining claims, was rejected because it was not timely filed asserts on appeal and submits evidence that the land covered by his mining claims was not examined prior to the submission of the request for publication of notice to miners under section 5(a) of the act, the requesting agency will be called upon to determine whether it desires to amend its request to exclude the land in the appellant's mining claims.

Ford M. Converse, A-27863 (Apr. 20, 1959)

It is not the function of the Department of the Interior under the act of July 23, 1955, to go behind the statements contained in a request for publication, and if the request for publication on its face complies with requirements of the act, the Department's sole function is to order the publication as requested.

Personal service of a notice to miners that a statement asserting rights to the surface of their claims must be filed under the act of July 23, 1955, is not required where the department or agency requesting publication of the notice has complied with the terms of section 5(a) of the act.

A statement filed by a mining claimant pursuant to section 5 of the act of July 23, 1955, for the purpose of asserting rights to the surface resources on its mining claim is properly rejected where the statement is filed more than 150 days from the first date of publication of notice to miners under section 5(a) of the act, and the statement is not verified.

Mena Mining and Exploration Company, A-27950 (Jun. 12, 1959) 66 I. D. 228

The act of August 11, 1955, does not operate retroactively to validate mining claims which were void at their inception nor to permit retroactive relocation of claims which were void because the lands included therein were withdrawn for a power site at the time of the original location.

Howard W. Balsley, A-27920 (Jun. 15, 1959)

Where notice of publication is required by section 5 of the act of July 23, 1955, to be personally delivered to or to be mailed by registered mail to a mining claimant, the requirement is satisfied by mailing the notice by registered mail to the proper address and it is immaterial that the mail is returned unclaimed.

A verified statement required under the act of July 23, 1955, is properly rejected and the use of the surface resources denied to the mining claimant when such statement is filed prior to the publication of any notice for the land covered by the claim, returned to the claimant prior to publication, and then refiled after the end of the 150-day period following publication.

William Kuhn, A-27963 (July 20, 1959) 66 I. D. 268

Where a river bed is included within the limits of a mining claim, query whether the effect of mining operations on the use of the river bed as a water course may be properly considered in determining, under section 2(b) of the act of August 11, 1955, whether mining operations substantially interfere with other uses of the land included within the claim.

The dismissal of a protest against the conditional allowance of a placer mining claim under the act of August 11, 1955, is proper where the evidence supports the conclusion that placer mining operations would not substantially interfere with other uses of the land included within the placer claim.

Pacific Gas and Electric Company et al., A-27934 (July 20, 1959) 66 I. D. 264

A verified statement required under the act of July 23, 1955, is properly rejected and the use of the surface resources denied to the mining claimant when the statement is filed after the termination of the period of 150 days prescribed by the statute for filing such a statement.

A verified statement required under the act of July 23, 1955, is not "filed" until such time as it is received in the office where the filing is required, and where the statement is deposited in the mail on or prior to the 150th day after publication of the notice to mining claimants

MINING CLAIMS--Continued

SPECIAL ACTS--Continued

that such a statement is required, but is not received until the 151st day, the statement is not timely filed and must be rejected.

Mary E. Poast, A-27968 (Jul. 22, 1959)

Where a mining claimant has failed to file the notice of location required by the act of August 11, 1955, within the time allowed by the act, his rights to the claim are forfeited and the claim is properly declared null and void.

Jennie Ross Cassity Banks, A-27996 (Aug. 4, 1959)

A verified statement required under the act of July 23, 1955, is properly rejected and the use of the surface resources denied to the mining claimant where the lands embraced in the claims were included in a powersite withdrawal at the time the claims were located, but it is error to reject the statement as to a claim which was originally located prior to the withdrawal for powersite purposes.

Harold Dale, A-28105 (Nov. 19, 1959)

Mining claims are null and void where the claims were purportedly located at various times between 1949 and 1953 on lands which were included in oil and gas leases or an application therefor when the attempted locations were made, and the requirements of the acts of August 12, 1953, and August 13, 1954, under which the claims might have been validated, have not been met.

Mesilla Valley Construction Company et al., A-28102 (Nov. 20, 1959)

SURFACE USES

Verified statements required under the act of July 23, 1955, are properly rejected and the use of surface resources denied to the mining claimants when such statements are filed after termination of the period of 150 days prescribed by the statute for filing such statements.

Hines Gilbert Gold Mines Company, A-27732 (Nov. 13, 1958) 65 I. D. 481

MINING CLAIMS--Continued

SURFACE USES--Continued

Where a mining claimant whose verified statement, filed pursuant to section 5 of the act of July 23, 1955, for the purpose of asserting rights to the surface resources on his mining claims, was rejected because it was not timely filed asserts on appeal and submits evidence that the land covered by his mining claims was not examined prior to the submission of the request for publication of notice to miners under section 5(a) of the act, the requesting agency will be called upon to determine whether it desires to amend its request to exclude the land in the appellant's mining claims.

Ford M. Converse, A-27863 (Apr. 20, 1959)

A statement filed by a mining claimant pursuant to section 5 of the act of July 23, 1955, for the purpose of asserting rights to the surface resources on its mining claim is properly rejected where the statement is filed more than 150 days from the first date of publication of notice to miners under section 5(a) of the act, and the statement is not verified.

Mena Mining and Exploration Company, A-27950 (Jun. 12, 1959) 66 I. D. 228

The dismissal of a protest against the conditional allowance of a placer mining claim under the act of August 11, 1955, is proper where the evidence supports the conclusion that placer mining operations would not substantially interfere with other uses of the land included within the placer claim.

Pacific Gas and Electric Company et al., A-27934 (July 20, 1959) 66 I. D. 264

A verified statement required under the act of July 23, 1955, is properly rejected and the use of the surface resources denied to the mining claimant when such statement is filed prior to the publication of any notice for the land covered by the claim, returned to the claimant prior to publication, and then refiled after the end of the 150-day period following publication.

Where notice of publication is required by section 5 of the act of July 23, 1955, to be personally delivered to or to be mailed by registered mail to a mining claimant, the requirement is satisfied by mailing the notice by registered mail to the proper address and it is immaterial that the mail is returned unclaimed.

William Kuhn, A-27963 (July 20, 1959) 66 I. D. 268

MINING CLAIMS--Continued

SURFACE USES--Continued

A verified statement required under the act of July 23, 1955, is properly rejected and the use of the surface resources denied to the mining claimant when the statement is filed after the termination of the period of 150 days prescribed by the statute for filing such a statement.

A verified statement required under the act of July 23, 1955, is not "filed" until such time as it is received in the office where the filing is required, and where the statement is deposited in the mail on or prior to the 150th day after publication of the notice to mining claimants that such a statement is required, but is not received until the 151st day, the statement is not timely filed and must be rejected.

Mary E. Poast, A-27968 (Jul. 22, 1959)

TITLE

The possessory title of a mining claimant is such that he can cut timber on the claim for mining purposes but not for other purposes nor for sale.

Authority of the Bureau of Land Management to Sell Timber on an Unpatented Mining Claim, M-36265 (Mar. 11, 1955)

The general rule that a statute may not be retroactively construed so as to affect vested possessory rights or titles is not applicable to recording statutes provided a reasonable time is allowed for recording.

Construction of Recording Requirement of Section 4, Act of August 11, 1955 (69 Stat. 681; 30 U. S. C. sec. 623), M-36429 (Oct. 30, 1957) 64 I. D. 393

WITHDRAWN LAND

Where withdrawn public lands which had been declared surplus under the 1944 Surplus Property Act were transferred by the War Assets Administration to a State for wildlife purposes pursuant to 16 U.S.C. sec. 667b and the reserved minerals transferred to the Interior Department for administration under the public land laws, the surface is no longer withdrawn public land. The reserved nonleasable minerals are not subject to location

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

under the mining laws because of the unavailability of the surface.

Availability of a Non-Leasable Mineral (Tungsten) in Former Ft. Huachuca Military Reservation, Arizona, M-36256 (Jan. 18, 1955)

Mining claims which are made on land withdrawn from mineral entry are void ab initio .

United States v. Clyde W. Riggle et al. A-27184 (July 11, 1955)

A mining claim initiated at a time when the land was subject to the operation of the mining laws is not a valid claim unless there has been a discovery of minerals within the limits of the claim prior to the withdrawal of the land from the operation of the mining laws.

United States v. Wilmot D. Everett et al., A-27010 (Supp.) (Oct. 17, 1955)

A mining claim for a nonmetalliferous mineral located on land withdrawn from lease or other disposition except under the mining laws for metalliferous minerals confers no rights upon the locator.

A mining claim located on land subject to a first form reclamation withdrawal initiates no rights in the locator and is invalid.

R. J. Walter et al., A-27243 (Mar. 15, 1956)

A petroleum reserve created by a withdrawal made under and pursuant to the provisions of the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497; 43 U.S.C. secs. 141, 142), is a temporary withdrawal which, in and of itself, does not prevent the location of mining claims for metalliferous minerals.

Metalliferous Mining Locations Within a Petroleum Reserve, M-36375 (May 3, 1956) 63 I. D. 346

Lands withdrawn from mining location cannot be made subject to location by modifying the withdrawal where, after the lands were withdrawn the Fish and Wildlife Service had, pursuant to statutory authority, granted the use and

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

control of the land to a State for use in a wildlife project unless or until the land is released by the State.

Application of Mining Laws to Withdrawn Lands Used by a State for Wildlife Purposes, M-36407 (Jan. 25, 1957)

Land within a mining claim not validated by a discovery before the land is withdrawn from location may be leased by the Atomic Energy Commission for the development of the minerals.

Virgin No. 3 Lode Claim; Whether Discovery Made by Geological Survey May be Adopted by Locator of a Mining Claim as a Discovery to Support the Location, M-36424 (Mar. 4, 1957)

By the provisions of the act of August 11, 1955 (69 Stat. 681; 30 U. S. C. sec. 623), as construed by the Solicitor in his opinion dated October 30, 1957 (M-36429, 64 I. D. 393), the owner of a mining claim located prior to the date of the act, upon lands within a power site which had been restored to mining location subject to section 24 of the Federal Power Act, is required to file a copy of the location notice in the appropriate land office within 1 year after the date of the act and failure to record the notice in the land office within the required time constitutes an invalidation of the claim and renders it null and void.

Effect of the Act of August 11, 1955 (69 Stat. 681; 30 U. S. C. Sec. 623), M-36501 (Jan. 23, 1958) (Memorandum from Regional Solicitor, Sacramento, California, to Regional Director, Bureau of Reclamation, Sacramento, California, January 23, 1958.)

The act of August 11, 1955 (69 Stat. 681; 30 U. S. C. secs. 621-625), requiring that a copy of a location notice be filed for record in the land office, contemplates an instrument which describes the land and where under State law the location notice is not required to do so but the location certificate is required to do so, a copy of the location certificate, duly filed, meets the intent of the law.

Where an act, in apparently mandatory language, requires the filing of a location notice for record within 60 days after the date of location of land in a power site reserve, it is competent to examine the legislative history to see if it supports the conclusion that it was intended to make the requirement a mandatory one. The acceptance by Congress of the administrative determination of language by the agency designated to administer the law if enacted and the

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

enactment of the bill without change in the language or evidence of an intent to have the language construed otherwise is persuasive that it should be construed as mandatory.

Mineral Locations on Power Site Withdrawals--Act of August 11, 1955 (69 Stat. 681; 30 U. S. C. Secs. 621-625), M-36468 (Mar. 6, 1958)

Prior to passage of the act of August 11, 1955, lands embraced in an existing power-site withdrawal were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power-site purposes, but prior to passage of the act, is null and void where the land embraced in the claim had not been restored to entry under section 24 of the Federal Power Act at the time of location.

Day Mines, Inc., A-27553 (Mar. 28, 1958) 65 I. D. 145

Neither the Atomic Energy Act of 1946 nor the Atomic Energy Act of 1954 restored to the operation of the mining laws lands previously reserved or withdrawn from the operation of those laws.

The act of August 11, 1955, the Mining Claims Rights Restoration Act of 1955, did not open to mining location land which was previously withdrawn or reserved for power development or power sites and which, in addition, was withdrawn for reclamation purposes.

Mining claims located on land withdrawn for power site purposes are null and void where such locations were made prior to the act of August 11, 1955.

A. W. Kimball et al., A-27526 (Apr. 21, 1958) 65 I. D. 166

Where locators of a mining claim fail to prove that their claim is situated in a different position from that asserted by the Government in adversary proceedings against the validity of the claim and where the best evidence produced at the hearing is that the claim is situated as asserted by the Government and that no discovery of valuable mineral deposits had been made within the limits of the claim prior to the withdrawal of the land from the operation of the mining laws, it is proper to hold the claim to be null and void.

United States v. Willard Christensen et al., A-27549 (May 14, 1958)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

The location of a mining claim for a nonmetalliferous mineral on land withdrawn from disposition under the public land laws except under the mining laws for metalliferous minerals confers no rights upon the locator and the claim is properly declared null and void.

Walter Pedersen, A-27734 (Dec. 17, 1958)

A mining claim located on land subject to a first form reclamation withdrawal initiates no rights in the locator and is void from its purported inception.

Ralph M. Bostrom, A-27806 (Dec. 23, 1958)

A mining claim which is null and void at its inception because the land is embraced in an existing power-site withdrawal cannot subsequently be validated as of the date of the original location by relocation after the land is opened to mining location under section 24 of the Federal Power Act.

The act of August 11, 1955, does not operate retroactively to validate mining claims which were void at their inception nor to permit retroactive relocation of claims which were void because the lands included therein were withdrawn for a power site at the time of the original location.

Howard W. Balsley, A-27920 (Jun. 15, 1959)

The dismissal of a protest against the conditional allowance of a placer mining claim under the act of August 11, 1955, is proper where the evidence supports the conclusion that placer mining operations would not substantially interfere with other uses of the land included within the placer claim.

Pacific Gas and Electric Company et al., A-27934 (July 20, 1959) 66 I. D. 264

Where a mining claimant has failed to file the notice of location required by the act of August 11, 1955, within the time allowed by the act, his rights to the claim are forfeited and the claim is properly declared null and void.

Jennie Ross Cassity Banks, A-27996 (Aug. 4, 1959)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

Where a mining claim is located on land which is subsequently withdrawn for powersite purposes, an amendment of the location following the withdrawal does not vitiate the claim.

A verified statement required under the act of July 23, 1955, is properly rejected and the use of the surface resources denied to the mining claimant where the lands embraced in the claims were included in a powersite withdrawal at the time the claims were located, but it is error to reject the statement as to a claim which was originally located prior to the withdrawal for powersite purposes.

Harold Dale, A-28105 (Nov. 19, 1959)

NATIONAL PARK SERVICE AREAS

GENERALLY

A visitor to an area forming part of the National Park system is, under ordinary circumstances, a licensee by invitation or permission, but is not a business visitor, even though the park is one where a fee is charged.

Claim of Mrs. Kathryn L. Rogers, TA-125 (May 31, 1956) 63 I. D. 150

CONCESSION CONTRACTS

Generally

Modification of language in provision for settling, by arbitration, disputes as to the character and amount of a readjusted franchise fee under concession contracts of the National Park Service which includes appropriate criteria for the guidance of the arbitrators in determining the amount and character of the fee.

Inclusion in Concession Contracts of Provision for Arbitration, M-36440 (June 3, 1957)

NATIONAL PARK SERVICE AREAS --Continued

JURISDICTION OVER LANDS WITHIN

The rights and duties of private persons within a National Park Service area over which the United States has acquired exclusive jurisdiction are governed solely by Federal law, but the law in force within the area immediately prior to the transfer of jurisdiction is considered to have been adopted by the Federal Government to the extent that it is not inconsistent with the changed legal situation brought about by the transfer or with any Federal enactment or purpose, whether existing at the time or subsequently adopted.

Claim of Mrs. Kathryn L. Rogers, TA-125 (May 31, 1956) 63 I. D. 150

The Federal law, by which the rights and duties of private persons within a National Park Service area over which the United States has acquired exclusive jurisdiction are solely governed, encompasses State Laws that have been made applicable to such area by act of Congress. Consequently, tort claims arising out of accidents within a National Park Service area over which the United States has acquired exclusive jurisdiction are to be determined in accordance with State laws if the subject matter of the claim is covered by a statute, such as the act of February 1, 1928 (45 Stat. 54; 16 U.S.C. sec. 457), that adopts State laws as the Federal rule of decision.

Application of State Laws to Accidents Within Areas Over Which the United States has Acquired Exclusive Jurisdiction, M-36414 (Feb. 1, 1957)

LAND

Acquisition

The language of the current legislation (act of August 31, 1954; 68 Stat. 1037) authorizing acceptance of donated funds to be matched by appropriated funds for acquisition of non-Federal lands within the existing boundaries of any national park is clear and unambiguous and it was the intent of the Congress to require that donations be made in cash in order to be eligible for such matching. Accordingly, a donation of an equivalent in land value could not be accepted in lieu of a cash donation.

Use of "50-50" Land Acquisition Funds for the Possible Acquisition of Tract No. 317-B (Marie Schuler), Rocky Mountain National Park, M-36384 (Oct. 19, 1956)

NATIONAL PARK SERVICE AREAS --Continued

LAND --Continued

Acquisition --Continued

A contract to purchase non-Federal land in a national park subject to a reservation by the vendor of a life estate, if coupled with a prior agreement by the landowner to "donate" funds to the National Park Trust Fund if and when the purchase is completed, on condition that the funds are to be used to construct a road from which the life tenant will benefit, is unauthorized.

An agreement by a landowner to donate funds to the National Park Trust Fund, conditioned upon the purchase of the land for national park purposes and the use of the funds to construct a road from which the landowner will benefit as life tenant of the land, is invalid and unenforceable since a donation upon these conditions will not result in a "voluntary transfer of property without any consideration or compensation therefor."

Authority to Enter Into a Contract to Purchase Land if Coupled with an Agreement by the Landowner to Donate Funds to the United States for Specified Purposes When the Purchase is Completed; Eileen M. Hunter Property, Grand Teton National Park, M-36402 (Jan. 14, 1957)

NAVIGABLE WATERS

The bed of a navigable river does not pass to a State in its entirety upon the State's admission to the Union where prior to that time a portion of the bed was included in an Indian reservation.

Mrs. Grace F. Holbeck et al., A-27361 (Oct. 31, 1956)

NOTICE

A statement by the Acting Director, Bureau of Land Management, in a decision approving an application for public sale of an isolated tract, that the grazing lessee on that tract would be given personal notice of the time and place of the sale (apart from the usual general notice by publication and posting) was properly construed

as the extension of a courtesy and not as the conferring of a right, there being no law or regulation requiring such personal notice.

Henry Petz, Mary B. Wilson, Administratrix of the Estate of Frank H. Wilson, A-27017 (Feb. 11, 1955) 62 I. D. 33

Where notice of a public sale of an isolated tract has been given by publication and posting, the sale will not be set aside because one of several applicants for the sale did not receive personal notice of the sale.

James J. Kendrew, A-27145 (April 8, 1955)

The publication in the Federal Register of an Executive order which in terms merely transfers lands from one land district to another is not necessarily notice to a lessee under an oil and gas lease that an application for the extension of his lease must be filed in the land district to which the lands covered by his lease have been transferred.

Donald C. Ingersoll, A-27306 (Dec. 5, 1956) 63 I. D. 397

In proceedings to probate the restricted estate of a deceased Indian of the Five Civilized Tribes in Oklahoma, substantial compliance must be had with the notice provisions of section 3(b) of the act of August 4, 1947 (61 Stat. 731).

Distribution of Restricted Indian Estate, M-36426 (Jan. 4, 1957) 64 I. D. 17

Notwithstanding the provisions of 43 CFR 221.62 with regard to publication of notice, where a statute prescribes a different method of effecting such notice it must be complied with.

Forms for Service by Publication, M-36497 (Jan. 21, 1958) (Memorandum from Regional Solicitor, Denver, Colorado, to State Supervisor, Bureau of Land Management, Cheyenne, Wyoming.)

"Newspaper of general circulation" defined and language of opinion M-36497 of January 21, 1958, explained.

Forms for Service by Publication, M-36497 (Supp.) (June 11, 1958)

The omission of the designation of the range in the description of lands offered for sale as an isolated tract can be regarded as immaterial when all of the bidders correctly identified the offered lands in their bids or proofs of their preference right to purchase and there is no showing that any one interested in the sale was misled by the omission of the range designation.

Redd & Summers, Mabel Marie McComb, Jewell L. Gardner, A-27692 (July 31, 1958)

A decision sent by registered letter by the land office to an applicant for a small tract, requiring him to fill out his application on new forms and remit within 30 days after receipt of the letter, constitutes notice to the applicant even though the letter was not received because the applicant had changed his address without notifying the land office so that rejection of the application is proper for want of response from the applicant.

John W. Southard, Clarence H. Pittman, A-27627 (Aug. 15, 1958)

Section 31 of the Mineral Leasing Act, authorizing cancellation of a noncompetitive oil and gas lease for failure to comply with the terms of the lease after 30 days' notice sent by registered mail to the record address of the lease owner, is fully complied with when the default notice was sent to a person representing himself as attorney for the lease owners, and where all previous notices had been addressed in care of such attorney and the lease owners had never indicated any other address to which notices and communications concerning the lease should be sent.

S. M. Covey et al., A-27639 (Aug. 21, 1958) 65 I. D. 361

Where notice of publication is required by section 5 of the act of July 23, 1955, to be personally delivered to or to be mailed by registered mail to a mining claimant, the requirement is satisfied by mailing the notice by registered mail to the proper address and it is immaterial that the mail is returned unclaimed.

William Kuhn, A-27963 (July 20, 1959) 66 I. D. 268

The language of an oil and gas lease which explicitly authorizes the lessee to go upon the leased land to drill for and remove oil therefrom

NOTICE--Continued

constitutes written notice of such authorization which nullifies an earlier notice in a receipt issued for advance payment of the rental required to be paid when the lease offer is filed that entry upon the land included in the lease offer is not permitted until notice is given in writing.

Duncan Miller, A-28001 (Aug. 5, 1959)

A presumptive heir who did not receive the notice of hearing required by 25 CFR 15.4 is entitled to a new hearing in special circumstances where none of the presumptive heirs was present at the original hearing and the record fails to disclose a definite attempt to locate them for notification.

Estate of Alphonse Guie, also known as Gwen or Gua, IA-1030 (Dec. 2, 1959)

OIL AND GAS LEASES

GENERALLY

Although an extension of an oil and gas lease is unauthorized and is subject to cancellation, it serves to segregate the land and prevent other filings until the cancellation is effected and noted on the land office records.

John J. Farrelly et al., A-27068 (Jan. 7, 1955) 62 I. D. 1

The last sentence of the fourth paragraph of section 17(b) of the Mineral Leasing Act, as amended, relating to the extension of unitized oil and gas leases upon their elimination from a unit agreement or the termination of the unit agreement applies to all such leases without the necessity of the lessee filing the notice of election provided for by section 15 of the act of August 8, 1946.

H. Leslie Parker, M. N. Wheeler, A-27066 (Mar. 18, 1955) 62 I. D. 88

OIL AND GAS LEASES--Continued

GENERALLY--Continued

The provisions of 18 U.S.C. sec. 431, and of section 9 of noncompetitive oil and gas leases make unlawful the holding of an oil and gas lease by a Member of Congress even though the lease was issued at a time when the lessee was not a Member of Congress.

John E. Miles, A-27075, A-27144 (April 11, 1955) 62 I. D. 135

Under item (1) of section 12 of the act of August 8, 1946, definitions of the productive limits of oil and gas deposits found to exist on that date cannot later be changed on the basis of information developed after that date.

Richfield Oil Corporation, A-27083 (July 18, 1955) 62 I. D. 269

Where an oil and gas lease is issued for land part of which is already included in an outstanding lease, the lessee is not entitled to a cancellation of his lease and the issuance of a new lease bearing a current date covering only the land available for leasing.

Noel Teuscher, A-27195 (Dec. 19, 1955) 62 I. D. 470

Where the pertinent regulation requires the payment of a fee upon the filing of an assignment of a royalty interest in an oil and gas lease, there is no reason to return a fee so paid because, contrary to the assignee's expectation, no approval of the assignment was given because there was no discovery upon the lands covered by the lease.

Neil F. Stull, A-27220 (Feb. 15, 1956)

An applicant who furnishes the Department with information which leads to the cancellation of an outstanding oil and gas lease does not thereby acquire a preference right to a lease when the land becomes available for leasing.

Joyce A. Cabot, Allen B. Cabot, Walter G. Davis et al., A-27270 (May 7, 1956) 63 I. D. 122

OIL AND GAS LEASES--Continued

GENERALLY--Continued

Although an oil and gas lease may be a nullity insofar as it purports to convey an interest in oil and gas deposits already under lease, it nevertheless serves to segregate the land and makes it unavailable for further leasing until such time as its revocation is noted on the records of the local land office and an oil and gas lease issued to another for the same land prior to such notation must be canceled.

R. B. Whitaker, Mrs. Jacqueline Anderson, A-27284 (May 7, 1956) 63 I. D. 124

An extension of an oil and gas lease will not be questioned upon the basis of unsupported charges that the unit agreement to which it is committed "may be illegal under the law including the anti-trust laws" and that the lessee has trespassed on another oil and gas lease.

D. Miller, Continental Oil Company, A-27366 (Sept. 27, 1956)

State community property laws should not be considered in determining the acreage chargeable to a holder of oil and gas leases because (1) they are governed exclusively by Federal law, (2) since their applicability has not been authorized by Congress their application would be contrary to the Constitution of the United States, and (3) the lessee's obligation is in the nature of a contractual obligation which can only be transferred with the approval of the Secretary of the Interior.

The State laws applicable to Federal oil and gas leases are limited to those classes of laws authorized or recognized by section 32 of the Mineral Leasing Act (41 Stat. 437; 30 U.S.C. sec. 181 et seq.), as amended.

Applicability of State Community Property Laws to Federal Oil and Gas Leases With Respect to Acreage Limitations, M-36416 (Feb. 27, 1957) 64 I. D. 44

Under the terms of an oil and gas lease issued pursuant to the provisions of the Mineral Leasing Act, as amended, and under the regulations of the Department which are a part of such a lease, there is a duty on the part of the lessee to market the gas from an oil well and this obligation is not discharged until the gas is in such a condition that it can enter the market for oil well gas in the field in which the oil well is located.

The Texas Company, A-27427 (Apr. 1, 1957) 64 I. D. 76

OIL AND GAS LEASES--Continued

GENERALLY--Continued

Where apparent administrative construction of a bill contained in a report to the congressional committee in charge of the bill is accompanied by a proposed clarifying and limiting amendment upon which Congress takes no action and the law considered as a whole reasonably warrants a different construction more consistent with the apparent intent of Congress the latter will be adopted particularly when subsequent administrative practice conforms to it rather than to the prior administrative construction.

Authority to Extend a Segregated Lease for 2 Years From the Date of Discovery of Oil or Gas in Paying Quantities During an Extended Term on any Other Segregated Portion of the Lands Originally Subject to the Same Lease, M-36472 (Nov. 20, 1957)

A remote assignee of an oil and gas lease has no standing, in the absence of supporting evidence, to claim that the original lessee did not consent to the terms of the lease as it was issued.

United Manufacturing Company et al., A-27608 (Mar. 5, 1958) 65 I. D. 106

As 41 Stat. 1239 does not authorize the assignment by the United States of its lessor's interest or by the Secretary of his jurisdiction, there can be no conveyance pursuant to said act subject to an outstanding oil and gas lease, and the Government cannot convey its interest as lessor, but the land should be conveyed exclusive of the oil and gas lease or leases, thus leaving the title to the oil and gas in the United States for the duration of the lease or leases.

Authority of the Secretary of the Interior to Assign his Jurisdiction Over an Oil and Gas Lease or the Lessor's Interest Therein, M-36436 (Supp.) (Apr. 14, 1958)

Where by mistake an oil and gas lease is issued for lands embraced in an existing lease, and upon discovery of the error the second lease is canceled, the holder of the prior lease is not entitled to have his lease canceled and a new lease issued to him and a refund made of the annual rentals paid on the lease.

D. Miller, A-27591 (June 23, 1958)

OIL AND GAS LEASES--Continued

GENERALLY--Continued

The requirements contained in original sections 13 and 14 of the act of February 25, 1920 (41 Stat. 437, 441 and 442), do not apply to noncompetitive oil and gas leases to be issued under section 17 of the act of February 25, 1920 (41 Stat. 437, 443), as amended by the act of August 21, 1935 (49 Stat. 674, 676 and 677), and as further amended by section 3 of the act of August 8, 1946 (60 Stat. 950, 951; 30 U. S. C. sec. 226). Section 17 has never contained authority for conforming unsurveyed leased lands to public survey.

It would be improper to incorporate into a non-competitive oil and gas lease describing lands by metes and bounds a provision to the effect that the lease will be conformed to the nearest legal subdivisions upon public survey of the land and that the lease will be canceled as to lands in conflict with prior leases.

A lease describing unsurveyed lands by metes and bounds is not subject to adjustment (enlarged, diminished, floated or shifted) to the nearest subdivisional lines when the lands are surveyed and the lease describing the lands by metes and bounds is fixed to the location and area of land within the lease as described by metes and bounds.

Noncompetitive Oil and Gas Lease Applications and Leases on Unsurveyed Public Lands Within the United States Under the Mineral Leasing Act of February 25, 1920, as Amended, M-36542 (Aug. 8, 1958)

(Memorandum from Regional Solicitor, Denver, Colorado, to Area Administrator, Area 3, Bureau of Land Management, Denver, Colorado, August 8, 1958.)

Where all the oil and gas lease offerors are maintaining both public domain and acquired lands offers for the same tracts of land, where no one of them is insisting that a lease must be issued only under one type of offer to the exclusion of the other but each is willing to accept either type of lease, where the Director in a carefully considered opinion found the lands to be leasable only as public domain, and where there is no obvious error in the Director's determination, there is no necessity to disturb the Director's determination.

Henry S. Morgan et al., A-27529 (Aug. 27, 1958) 65 I. D. 369

The Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 181 et seq.), as amended, prescribes in terms those to whom

OIL AND GAS LEASES--Continued

GENERALLY--Continued

mineral leases may be issued and, therefore, excludes all others. It does not provide for the issuance of leases to tenancies as such.

May Oil and Gas Leases be Owned by Two or More Persons With Right of Survivorship? M-36434 (Sept. 12, 1958)

An oil and gas lease is properly dated the first day of the month following the date it is signed on behalf of the United States; and the fact that a substitute lease containing an adjusted description of unsurveyed lands is, solely at the request of the lessee, executed on a form which differs in immaterial ways from the form on which the original lease was executed is no basis for redating the lease as if it were a new lease, the terms of issuance of the substitute lease being the same as those of the original lease.

D. Miller, A-27722 (Nov. 12, 1958)

Where a mineral claimant applies for a patent for land included within a prima facie valid oil and gas lease, the mineral entry cannot be allowed until the mineral applicant has established the validity of his claim either in a contest brought against the oil and gas lease or at a hearing ordered by the Department at which the mineral claimant will have the burden of proof.

When the United States issues an oil and gas lease, it makes no warranty as to its title to the oil and gas deposits and is under no obligation to the lessee to defend the lease against other claims to the oil and gas deposits.

Duncan Miller, Union Oil Company of California, A-27727 (Dec. 9, 1958)

Where a State swampland selection conflicts with a prima facie valid oil and gas lease, the swampland application will not be allowed until the State has established the swamp character of the land either in a contest brought against the oil and gas lease or at a hearing ordered by the Department at which the State will have the burden of proof.

State of Louisiana, Thomas Connell, A-27817 (Jan. 30, 1959)

OIL AND GAS LEASES--Continued

GENERALLY--Continued

Upon the admission of Alaska into the Union, the authority granted to the Secretary of the Interior by the act of July 3, 1958, to lease lands beneath nontidal navigable waters terminated.

Pexco, Inc., et al., A-27868 (Apr. 7, 1959)
66 I. D. 152

The language of an oil and gas lease which explicitly authorizes the lessee to go upon the leased land to drill for and remove oil therefrom constitutes written notice of such authorization which nullifies an earlier notice in a receipt issued for advance payment of the rental required to be paid when the lease offer is filed that entry upon the land included in the lease offer is not permitted until notice is given in writing.

Duncan Miller, A-28001 (Aug. 5, 1959)

An oil and gas lessee is not entitled by virtue of his leasehold interest to take and use mineral materials, other than oil and gas, from the leased lands for the purpose of operations under the lease. The Materials Act of July 31, 1947 (61 Stat. 681; as amended, 30 U.S.C., 1952 ed., Supp. V, sec. 601), limits disposal of such materials to disposals under that act and, absent other authority of law, that act governs.

The supervision of oil and gas development and producing operations on Federal, public and acquired land oil and gas leases is a function of the Geological Survey and reports of violations of the relevant lease terms and operating regulations should be referred to the appropriate official of that Bureau.

Rights of an Oil and Gas Lessee to the Use of the Surface of the Land and Surface Materials in His Lease, and With Respect to Injury to the Land and Vegetation by Reason of Operations Under the Lease, M-36575 (Aug. 26, 1959)

ACQUIRED LANDS LEASES

It was proper, prior to August 5, 1955, to offer a present interest lease to an applicant for a future interest lease who had met all of the mandatory requirements of the regulations governing the issuance of future interest leases and whose application had not been acted upon prior to the vesting of the present interest in the minerals in the United States.

J. J. Newman Lumber Company, Alfred S. Black, A-27205 (Oct. 10, 1955)

OIL AND GAS LEASES--Continued

ACQUIRED LANDS LEASES--Continued

If the Department determines that a tract of acquired land which is not within any known geological structure of a producing oil or gas field will be made available for oil and gas development, the Department is under a mandatory duty, imposed by statute, to lease the land to the qualified person who first submits a proper application for it.

Where an application for a noncompetitive oil and gas lease on acquired lands is signed for the offeror by an attorney-in-fact, and the offeror does not submit a statement as to his citizenship over his own signature until later, the application is entitled to priority only from the date on which the statement is filed.

A noncompetitive offer for an oil and gas lease on acquired lands filed after the effective date of the October 28, 1954, amendment of the pertinent regulation is required to state only that the offeror's interest in other such applications and leases does not exceed the maximum acreage permitted by law.

Pearl C. Baggett, W. M. Vaughey, A-27188 (Dec. 13, 1955)

Where land and the mineral deposits therein have been acquired by the United States in condemnation proceedings and jurisdiction over the oil and gas deposits is transferred to this Department for taking action to protect the United States from loss because of drainage of the oil and gas by wells on adjacent private lands, a protest by the former landowners against the issuance of competitive oil and gas leases covering the deposits will be dismissed where the protest is based upon unfounded assertions that the condemnation proceedings were invalid and that the protestants have a right to the reconveyance of the property or the minerals therein.

Albert J. DeLange et al., A-27277 (Jan. 4, 1956)

Where an acquired lands oil and gas lease application containing a description which does not identify the land applied for was filed after the effective date of the regulation providing that if the description in a lease application for public lands is insufficient to identify the land, the application will be rejected without priority, the acquired lands lease application must be rejected.

Where an acquired lands lease is issued containing an insufficient description of the land included in the lease and there are no intervening

OIL AND GAS LEASES--Continued

ACQUIRED LANDS LEASES--Continued

proper applications for the land, the lessee will be allowed a reasonable time in which to furnish an adequate description.

Columbian Carbon Company, Merwin E. Liss, A-27294 (June 11, 1956) 63 I. D. 166

If the Department determines that a tract of acquired land which is not within any known geological structure of a producing oil or gas field will be made available for oil and gas leasing, the Department is under a mandatory duty, imposed by statute, to lease the land to the qualified person who first submits a proper application for it.

W. M. Vaughey, George W. May, A-27389 (Oct. 31, 1956)

Where the United States acquires lands subject to a mineral reservation, the mineral deposits in such lands are subject to lease only under the Mineral Leasing Act for Acquired Lands, whether the United States mineral interest is future or has vested.

If the Department determines that a tract of acquired land which is not within any known geological structure of a producing oil or gas field will be made available for oil and gas leasing, the Department is under a mandatory duty, imposed by statute, to lease the land to the qualified person who first submits a proper application for it.

Stanley C. Woods, A-27382 (Nov. 6, 1956)

Where lands are conveyed to the United States subject to outstanding oil and gas leases and the grantor makes no reservation, the United States becomes the owner of the lessor's interest in the unexpired leases, and the lessee becomes the lessee of the United States so that the United States can enforce covenants and agreements on the part of the lessee. The said lands are not subject to noncompetitive oil and gas leasing under the Mineral Leasing Act for Acquired Lands of August 7, 1947 (61 Stat. 913; 30 U.S.C. sec. 351 et seq.), until it has been determined that the outstanding oil and gas leases are terminated. As the lands were acquired under the provisions of Title III of the Bankhead-Jones Farm Tenant Act and the outstanding leases were due to expire automatically by their own terms in 1944,

OIL AND GAS LEASES--Continued

ACQUIRED LANDS LEASES--Continued

the records of the Department of Agriculture can be turned to for guidance in determining whether the outstanding oil and gas leases are terminated.

Leasability as to Noncompetitive Oil and Gas Leasing Under the Mineral Leasing Act for Acquired Lands of August 7, 1947, of Certain Lands Conveyed to the United States Under the Provisions of Title III of the Bankhead-Jones Farm Tenant Act Subject to Outstanding Oil and Gas Leases, M-36430 (Mar. 29, 1957)

The Executive branch of the Government has implied authority to lease acquired lands to protect them from drainage in the absence of any express authority to lease such lands, and such implied authority is not circumscribed by the requirement that where the lands have not been determined to be within the known geologic structure of a producing oil or gas field they must be leased to the first qualified applicant.

Donald C. Ingersoll, A-27536 (Jan. 23, 1958)

An acquired lands oil and gas lease offer is properly rejected where the land description is insufficient to identify the lands applied for.

Duncan Miller, A-27566 (Apr. 29, 1958)

Where the United States quitclaims to private persons the mineral rights (excepting and reserving only coal) in acquired lands on which oil and gas leases are outstanding and the quitclaim deed does not except or reserve to the United States any right or interest as lessor under the oil and gas leases, the Department retains no jurisdiction over the mineral interests covered by the leases and after execution and delivery of the deed, the grantees of the United States become the lessors of the oil and gas leaseholds.

Godfrey Nordmark, A-27602 (July 21, 1958) 65 I. D. 299

An applicant for a noncompetitive lease of acquired lands being administered by the Forest Service is properly required to file written consent to stipulations imposed by that agency as a condition precedent to issuance of the lease, or face rejection of his offer.

Merwin E. Liss, A-27888 (Apr. 13, 1959)

OIL AND GAS LEASES--Continued

ACQUIRED LANDS LEASES--Continued

An acquired lands oil and gas lease offer which described a tract of unsurveyed land in terms of the tract number given it when it was acquired by the United States, the outside boundary of the tract, as surveyed by the acquiring agency, and lines run from points on the outside boundary to other points on the outside boundary by courses and distances, and which had, as part of the description, a map used by the agency administering the land on which the parts of the tracts desired are marked out, complied with the regulation in effect at the time the offer was filed.

A description in an acquired lands oil and gas lease offer for a tract of unsurveyed land which uses as part of the boundary a line drawn on a map prepared by the acquiring agency, but which does not give the course or distance for such line, is incomplete and is not a complete and accurate description of the land applied for.

An acquired lands lease offer for lands in which the United States owns only a fractional interest in the minerals must be rejected if it is not accompanied by a statement as to ownership of operating rights in the interest not owned by the United States.

Celia R. Kammerman et al., A-27768 (July 17, 1959) 66 I. D. 255

The limitation upon the Secretary's authority to refuse to approve an assignment of all or part of an oil and gas lease contained in section 30(a) of the act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 187(a)), as amended, is as regards assignments of fractional interest leases for acquired lands, subject to the provisions of section 5 of the act of August 7, 1947 (61 Stat. 913; 30 U.S.C. sec. 354), which results in the imposition of a qualification upon lessees of fractional interests additional to those prescribed in the act of February 25, 1920. However, the right given to one who makes an offer to lease such a fractional interest to show his qualifications is equally available to an assignee, whose assignment covers less than a majority interest in the whole deposit.

Assignment of Federally Owned Fractional Interest in Oil and Gas Lease by Lessee Who Also Owns but Does Not Assign the Privately Owned Remaining Fraction, M-36570 (Aug. 10, 1959)

An acquired lands oil and gas lease offer which described a tract of unsurveyed land in terms of the tract number given it when it was acquired by the United States, the outside boundary of the tract, as surveyed by the acquiring agency, and a line run from a point on the outside boundary to another point on the outside boundary by course and distance, and which had, as part of the description, a map used by the agency administering the land on which the part of the tract desired was marked out, complied with the regulation in effect at the time the offer was filed.

OIL AND GAS LEASES--Continued

ACQUIRED LANDS LEASES--Continued

A description in an acquired lands oil and gas lease offer for a tract of unsurveyed land which uses as part of the boundary a line drawn on a map prepared by the acquiring agency, but which does not give the course or distance for such line, is incomplete and is not a complete and accurate description of the land applied for.

Merwin E. Liss, A-27924, A-27940 (Aug. 31, 1959)

An acquired lands oil and gas lease offer for lands in which the United States owns only a fractional mineral interest does not earn the offeror priority until a statement as to ownership of operating rights in the mineral interest not owned by the United States is filed.

Merwin E. Liss, A-28038 (Oct. 30, 1959)

ACREAGE LIMITATIONS

An offeror for a noncompetitive oil and gas lease has 30 days within which to reduce his acreage holdings to the limitations prescribed by the Mineral Leasing Act without the loss of priority of his offer but in order to qualify to receive a lease on the acreage covered by his offer it must be shown that the offeror has been divested of his excess acreage within the prescribed period.

As the first day of the lease month following the filing of an assignment of an oil and gas lease is the earliest date upon which an assignment can take effect, an assignor is not divested of his interest in the assigned acreage at least until that date.

Acreage included in pending assignments of oil and gas leases in favor of an offeror must be charged to the acreage account of the offeror in determining the offeror's qualifications to receive a lease.

Where approval of an assignment of an oil and gas lease is not given until after the first day of the lease month following the filing of the assignment the acreage covered by the assignment remains charged to the acreage account of the assignor until the approval date.

Albert C. Massa et al., A-27158 (Sept. 6, 1955) 62 I. D. 339

OIL AND GAS LEASES--Continued

ACREAGE LIMITATIONS--Continued

Where an agent for lease offerors is chargeable with the acreage in the lease offers because of powers granted to him by the offerors to control the offers and any leases to be issued and such chargeable acreage exceeds the maximum permitted to be held, the filing of a release of practically all the powers vested in the agent will relieve the agent of the acreage charges and permit the issuance of leases to the offerors.

Where an agent for numerous oil and gas offerors is chargeable with the acreage in the lease offers because of arrangements he has with the offerors and such chargeable acreage exceeds the maximum acreage holding permitted by regulation, the agent is entitled to 30 days in which to reduce his excess acreage holdings.

Yakutat Development Company, Development Contract for Icy Bay--Cape Fairweather Area, Alaska, A-27067 (Apr. 10, 1956) 63 I. D. 97

Where the manager, on the assumption that, for the purpose of computing chargeable acreage, assignments of oil and gas leases were effective when filed, determined that an offeror did not hold in leases plus lease offers more than the prescribed limitation and where, after the issuance of the lease, the Department determined that for the purpose of computing acreage holdings assignments filed but not yet approved remain charged to the assignor's acreage account and that the offeror did in fact hold more than the prescribed limitation in leases plus lease offers when his offer was filed, the offeror will be granted the 30-day grace period accorded by 43 CFR 192. 3(c) within which to show his qualifications as an offeror.

Where an assignment of an oil and gas lease is not approved during the month in which the assignment is filed, the acreage covered by the assignment remains charged to the assignor's acreage account only until the subsequent approval date. To charge the assignor's acreage account with that acreage after that approval date is error.

Acreage included in assignments of interests in oil and gas leases not yet issued remains charged to the acreage account of the assignor until the leases are issued and the assignments are approved.

Albert C. Massa et al., A-27158 (Supp.) (Aug. 28, 1956) 63 I. D. 279

OIL AND GAS LEASES--Continued

ACREAGE LIMITATIONS--Continued

A husband and wife may each hold the maximum acreage permitted by section 27 of the Mineral Leasing Act (41 Stat. 437; 30 U.S.C. sec. 181 et seq.) as amended, to a single lessee. They may hold together, as an association, such maximum acreage. Where either holds the maximum acreage he (or she) may not hold additional acreage as trustee for minor children but where both hold the maximum acreage as an association either may hold in his (or her) own name or as trustee a total combined additional acreage equal to one-half the maximum.

May a Husband and Wife, or Either of Them, Hold the Maximum Permissible Acreage in Oil and Gas Leases in a State and Also Hold Additional Acreage as Trustee or Trustees for Their Minor Children, M-36418 (Mar. 11, 1957) 64 I. D. 51

Options on unitized leases are not excepted from option acreage charge. The exception in section 17b of the act [Mineral Leasing Act] of unitized leases from such charge is limited to holdings or control of leases and an option is not a lease holding or control since as provided in section 27 it shall not be "a taking or holding or control" of a lease under any provision of the act.

An option to acquire an undivided fractional interest in an oil and gas lease which carries with it either the right to prospect the entire lease or to control the disposition of the whole lease, is chargeable as an option holding for the entire acreage in the lease.

An option to acquire an oil and gas lease which by its terms, and without the prior approval of the Secretary of the Interior, is to run for more than 3 years of the life of the lease is not authorized by section 27 of the Mineral Leasing Act, as amended, and, therefore, it is not included in the exception from lease acreage charge contained in that section. Hence, such an option is chargeable against the 46,120-acre lease acreage limitation and not against the 200,000-acre option holding limitation.

Oil and Gas Lease Option Reports (30 U. S. C., 1952 ed., Supp. V, sec. 184), M-36555 (May 18, 1959)

Where the exact acreage covered by an oil and gas lease offer cannot be determined because certain unsurveyed lands included in the offer cannot be identified as a result of the indefinite description of such lands, but other lands covered by the offer are properly described, and where it cannot probably be said that the total acreage in the offer exceeds 2,560 acres, the offer is not subject to rejection for violation of the 2,560-acre rule.

Duncan Miller, A-28035 (Oct. 30, 1959) 66 I. D. 370

OIL AND GAS LEASES--Continued

APPLICATIONS

Where an applicant whose application for a public land oil and gas lease is rejected on the grounds that the United States has patented the lands without a reservation of the oil and gas, when, in fact, the United States has reacquired title to the surface and to the oil and gas deposits, fails to appeal from the rejection of his application, he does not have a preference right to an oil and gas lease upon the later filing of an acquired land application as against an intervening applicant who has filed a proper acquired land application.

William H. Reed, A-27064 (Jan. 24, 1955)

Where an applicant for an oil and gas lease which contains both lands leasable as public domain and as acquired lands first indicates that he desires the application to be treated as one for acquired lands and is informed that it will be so treated, and then notifies the Department that he desires the application to be considered as one for public lands, he does not earn a preference right to a public land oil and gas lease as against an applicant who files an intervening conflicting proper public land application.

If the Department determines that a tract of public land which is not within any known geological structure of a producing oil or gas field will be made available for oil and gas development, the Department is under a mandatory duty, imposed by statute, to lease the land to the qualified person who first submits a proper application for it.

John Snyder et al., A-27035 (Feb. 11, 1955)

An application for a present interest oil and gas lease on acquired lands is properly rejected where at the time when the application was filed the United States owned only a future interest in the oil and gas deposits.

A defective application for a future interest oil and gas lease on acquired lands which are subject only to future interest leasing when the application is filed cannot support the issuance of a present interest lease following the vesting of the present mineral rights in the United States.

Henry S. Morgan, A-26997 (Mar. 4, 1955) 62 I. D. 68

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

The first qualified applicant for land available for oil and gas leasing has a statutory preference right to a lease, if a lease is to be issued for the land, which must be honored.

C. T. Hegwer et al., A-27002 (Mar. 11, 1955) 62 I. D. 77

Where some members of a partnership which is engaged in the development of oil and mineral properties and their wives file simultaneous individual offers for oil and gas leases and the rental and filing fees are paid from partnership funds, the offers are not to be rejected as an attempt to defeat the fairness of a drawing without a further investigation into the circumstances surrounding the simultaneous offers and the financial arrangements involved.

Victoria Cuccia et al., A-27074 (April 5, 1955)

An oil and gas lease application which is filed for lands included in prior applications should be suspended rather than rejected pending determination of whether any of the prior applicants are entitled to a lease.

John E. Miles, A-27075, A-27144 (April 11, 1955) 62 I. D. 135

An application for a 5-year extension of an acquired lands oil and gas lease which is filed after the expiration of the primary term of the lease cannot be regarded as an application for a new lease where it fails to meet the requirements of an application for a new lease.

W. P. Clements, Jr., A-27073 (April 27, 1955)

An application for an oil and gas lease must be rejected when at the time it was filed the Mineral Leasing Act excluded the land applied for from leasing, although subsequently the act was amended to permit the leasing of such land.

Noel Teuscher et al., A-27099, A-27104, A-27192 (May 31, 1955) 62 I. D. 210

Where three or more oil and gas lease offers wholly or partially covering the same lands are filed simultaneously, necessitating a public drawing to determine the priority of preference, fraud on the part of one or more of the offerors, or collusion on the part of two or more of the offerors, aimed at unfairly enhancing the mathematical probabilities of success in

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

the drawing for those offerors, will result in the total rejection of the offers involved in the fraud or collusion.

Where several oil and gas lease offers wholly or partially covering the same lands are filed simultaneously, necessitating a public drawing to determine the priority of preference, a partial duplication of land in two offers by the same offeror will not result in the total rejection of either offer if there is no evidence that the duplication was the result of a deliberate effort on the part of that offeror to enhance the mathematical probabilities of his success in the drawing.

Quaere: Whether, where there is a partial duplication of land in two oil and gas lease offers filed simultaneously by the same individual, such offers being among several which others had likewise filed simultaneously, it is proper, in the absence of any evidence of fraud or bad faith, to eliminate the duplicated parcel from both of the aforesaid two offers prior to the holding of a public drawing to determine the priority of preference among all the simultaneously filed offers.

The departmental regulation establishing a minimum acreage requirement of 640 acres for each oil and gas lease offer has reference to land which is available for oil and gas leasing at the time of the offer; therefore, such an offer, if otherwise valid, may be accepted for an area of less than 640 acres so long as it embraced, at the moment of filing, at least 640 acres of available land.

Eugene J. Bernardini, Albert Chester Travis, A-27093 (June 20, 1955) 62 I. D. 231

A regulation which requires that, with certain exceptions, an offer for a noncompetitive oil and gas lease under the Mineral Leasing Act must include 640 acres of land is a reasonable exercise of the discretion vested in the Secretary of the Interior by the Mineral Leasing Act, and an offer which includes less than 640 acres and does not come within the exceptions is properly rejected.

Annie Dell Wheatley, The Superior Oil Company, Intervener, A-27142 (July 27, 1955) 62 I. D. 292

Where a regulation in effect at the time an application for an oil and gas lease is filed provides that no lease offers for less than 640 acres will be considered, an offer for less than 640 acres will be rejected.

August A. Frymark, A-27162 (Sept. 12, 1955)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

An application for a noncompetitive oil and gas lease filed after the cancellation of a former lease on the same lands and the notation of the cancellation of the former lease on the tract books is not prematurely filed even though filed prior to the expiration of the lease year of the canceled lease for which the rent had been paid.

The first qualified applicant for land available for oil and gas leasing has a statutory preference right to a lease, if a lease is to be issued for the land, which must be honored.

Zion Oil Company et al., A-27152 (Sept. 20, 1955) 62 I. D. 369

An amendment of a regulation governing applications for oil and gas leases will not be applied retroactively to the detriment of an application which was filed prior to the amendment and which was in accord with the regulations in effect at the time of filing.

A defective application for an oil and gas lease on acquired lands affords the applicant no priority until the defect is cured.

J. J. Newman Lumber Company, Alfred S. Black, A-27205 (Oct. 10, 1955)

Where an application for an oil and gas lease covers unsurveyed land in the bed of a nonnavigable lake and the United States is only one of several owners of the upland, it is proper to require the applicant to submit an agreement with the owners of the upland adjoining the federally owned uplands as to the boundaries of the land applied for or to demonstrate exactly what portions of the lakebed belong to the United States.

In describing a tract of unsurveyed land in a lakebed by metes and bounds in an oil and gas application, it is sufficient to use the meandered lakeshore as a part of the description without giving bearings and distances.

Halvor F. Holbeck, A-27200 (Nov. 14, 1955) 62 I. D. 411

Where an application for an oil and gas lease covers less than 640 acres and the land applied for adjoins land available for leasing, it will be deemed to be for the equivalent of a section and therefore proper so long as the amount by which it is under 640 acres is less than the amount that the inclusion of the smallest of the adjoining subdivisions available for leasing would put it in excess of 640 acres.

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

The fact that public land is covered by an outstanding application for an oil and gas lease does not render it not available for leasing within the meaning of the regulation requiring that, with certain exceptions, an application for an oil and gas lease include not less than 640 acres.

Natalie Z. Shell, A-27214 (Nov. 17, 1955) 62 I. D. 417

Where an applicant executed lease forms which did not include part of the land for which he applied and did not protest the omission which was apparent on the face of the lease, but acquiesced for nearly 3 years in the lease as it was issued, and where, in the meantime, a lease on the tract was issued to another person, the prior applicant is deemed to have abandoned his preferential right as the first qualified applicant to lease the land omitted from his lease and his application will not be reinstated to the detriment of intervening rights.

R. J. McGrath, A-27187 (Nov. 29, 1955)

If the Department determines that a tract of acquired land which is not within any known geological structure of a producing oil or gas field will be made available for oil and gas development, the Department is under a mandatory duty, imposed by statute, to lease the land to the qualified person who first submits a proper application for it.

A noncompetitive offer for an oil and gas lease on acquired lands filed after the effective date of the October 28, 1954, amendment of the pertinent regulation is required to state only that the offeror's interest in other such applications and leases does not exceed the maximum acreage permitted by law.

Where an application for a noncompetitive oil and gas lease on acquired lands is signed for the offeror by an attorney-in-fact, and the offeror does not submit a statement as to his citizenship over his own signature until later, the application is entitled to priority only from the date on which the statement is filed.

Pearl C. Baggett, W. M. Vaughey, A-27188 (Dec. 13, 1955)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

The mandatory requirement that an application for an oil and gas lease on acquired lands of the United States must contain a statement of the applicant's interests in oil and gas leases or applications therefor on acquired lands in the same State was not violated by one who, having no interests in oil or gas leases or lease applications on acquired lands in a State at the time he filed simultaneous applications, failed to indicate on each application that other applications for similar leases were being filed at the same time.

Madison Oils, Inc., T. F. Hodge, A-27163 (Dec. 28, 1955) 62 I. D. 478

One who files an offer for an oil and gas lease on land which is opened to disposition under the public land laws by an order which specifies a future date on which the land shall become subject to such offers and which provides that applications filed before such future date shall be treated as simultaneously filed as of that date does not acquire priority for his offer by filing it prior to the future date specified in the order.

Rachael S. Preston, A-27174 (Feb. 6, 1956) 63 I. D. 40

An applicant for a noncompetitive acquired lands lease who corrects his defective application within the period allowed by the Secretary to all similarly situated persons to make such correction without loss of priority, has priority in the issuance of a lease over a junior applicant who filed a proper application.

John C. de Armas, Jr., P. A. McKenna, A-27232 (Mar. 19, 1956) 63 I. D. 82

An application for a noncompetitive oil and gas lease filed in the interim between the relinquishment of a prior lease and the notation of the relinquishment on the tract book must be rejected.

Ralph J. Fuchs, A-27295 (Mar. 27, 1956)

Although a relinquishment of an acquired lands noncompetitive oil and gas lease may become effective to terminate the lease as of the day the relinquishment is filed, the lands embraced in the former lease are not open to

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

further filing until such time as the relinquishment is noted on the acquired lands plat records, and lease offers filed before such notation is made must be rejected.

E. A. Vaughey, A-27291 (Mar. 28, 1956) 63 I. D. 85

Where an offeror for an oil and gas lease enters into an agreement with an agent and grants an irrevocable power of attorney to the agent, under which the agent is granted extensive powers of control over the lease offer and any lease to be issued pursuant to the offer and the agent is to derive a substantial beneficial interest in any proceeds to be obtained under the lease, the agent is chargeable with the acreage in the lease offer.

Where an agent for lease offerors is chargeable with the acreage in the lease offers because of powers granted to him by the offerors to control the offers and any leases to be issued and such chargeable acreage exceeds the maximum permitted to be held, the filing of a release of practically all the powers vested in the agent will relieve the agent of the acreage charges and permit the issuance of leases to the offerors.

Yakutat Development Company, Development Contract for Icy Bay--Cape Fairweather Area, Alaska, A-27067 (Apr. 10, 1956) 63 I. D. 97

Where an offer for oil and gas lease is filed for 640 acres or more and the offer is then voluntarily withdrawn as to part of the acreage so as to bring the remaining acreage in the offer below 640 acres, the offer is properly rejected as being in violation of the departmental regulation requiring that an offer be for not less than 640 acres.

Halvor F. Holbeck, A-27330 (Apr. 11, 1956) 63 I. D. 102

Duncan Miller, A-27279 (Apr. 19, 1956)

Lands included within an outstanding oil and gas lease, whether such lease is void, voidable, or valid, are not available for leasing and applications filed for such lands must be rejected.

Joyce A. Cabot, Allen B. Cabot, Walter G. Davis et al., A-27270 (May 7, 1956) 63 I. D. 122

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

An oil and gas lease application is correctly rejected where the land applied for was not available for leasing because it was included in a prior lease which was relinquished before the expiration of its 5-year term, but the relinquishment and cancellation thereof had not been noted on the tract book when the application was filed.

Halvor F. Holbeck, A-27300 (May 14, 1956)

A regulation which provides that where a noncompetitive oil and gas lease is relinquished the land shall become available for the filing of new lease offers upon the notation of the relinquishment on the appropriate tract book is applicable even where the notation does not take place until after the end of what would have been the 5-year term of the lease in the absence of the relinquishment, and an application filed after that time but prior to the notation is prematurely filed and must be rejected.

An application to lease land filed prior to the notation on the appropriate tract book of the relinquishment of a prior lease on the same land must be rejected because the land is not available for further leasing until such notation is made.

M. A. Machris, Melvin A. Brown, A-27278 (June 11, 1956) 63 I. D. 161

Where an acquired lands oil and gas lease application containing a description which does not identify the land applied for was filed after the effective date of the regulation providing that if the description in a lease application for public lands is insufficient to identify the land, the application will be rejected without priority, the acquired lands lease application must be rejected.

Columbian Carbon Company, Merwin E. Liss, A-27294 (June 11, 1956) 63 I. D. 166

Where a regulation of the Department provides that no oil and gas lease offer for less than 640 acres will be considered, except in certain specific instances, an oil and gas offer to lease less than 640 acres which does not come within the exceptions stated in the regulation will be rejected.

Blanche W. Sweeney, A-27339 (July 16, 1956)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Where a regulation of the Department provides that no oil and gas lease offer for less than 640 acres will be considered, except in certain specific instances, an oil and gas lease offer to lease less than 640 acres which does not come within the exceptions will be rejected.

D. Miller, A-27348 (Aug. 7, 1956)

Where an oil and gas lease application covers an island which at best is partly ceded Indian land and partly public domain, and the extent of which cannot be determined without further investigation, and there is no indication that leasing is necessary to protect the interests of the United States, the application may be rejected.

Grace F. Holbeck, A-27357 (Aug. 20, 1956)

Lands included within an outstanding oil and gas lease, whether such lease is void, voidable, or valid, are not available for leasing to others and applications filed for such lands must be rejected.

Albert C. Massa et al., A-27158 (Supp.) (Aug. 28, 1956) 63 I. D. 279

An application for a noncompetitive lease filed in the interim between the relinquishment of a prior lease and the notation of the relinquish ment on the tract book must be rejected even though the land office manager informed the applicant that a notation of the relinquishment on the serial register page was sufficient to restore the land to oil and gas leasing.

An application filed prior to the notation on the tract book of the relinquishment of a prior lease must be rejected because the land is not available for leasing until such notation is made and the land does not become available for leasing merely because of the passage of the date on which the relinquished lease would otherwise have expired by operation of law.

Edgar C. Hornik, A-27340 (Sept. 19, 1956)

An oil and gas lease application is properly rejected where the lands applied for are included in outstanding oil and gas leases, regardless of whether the outstanding leases are void, voidable, or valid.

Mary Sue Davis, A-27381 (Oct. 31, 1956)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Where an attorney in fact has been authorized to act on behalf of the offeror with respect to the offer or lease, a statement concerning any possible interest the offeror may have in the lease must be filed with the offer and the offer is entitled to priority only from the date on which such a statement is filed.

W. M. Vaughey, George W. May, A-27389 (Oct. 31, 1956)

Where descriptions of unsurveyed land in oil and gas lease applications refer to the banks of a river as parts of the boundaries of the land applied for, without giving bearings and distances, and the banks of the river are continually changing so that it is impossible to identify the land applied for or to calculate the acreage from the metes and bounds descriptions, the applications are properly rejected.

Mrs. Grace F. Holbeck et al., A-27361 (Oct. 31, 1956)

It is error to hold that land in an oil and gas lease became available for filing at the expiration of the primary term of the lease when in fact the lease was extended for another 5 years.

Where an oil and gas lease is in its extended term, no application can be filed for the leased land regardless of whether the extension of the lease was valid or invalid.

An application for an oil and gas lease filed after a relinquishment of an existing lease has been filed but before notation of the relinquishment is made in the tract book is prematurely filed and is properly rejected.

Where an oil and gas application was stamped as filed 2 minutes prior to the notation of cancellation of a prior lease covering the land and it is contended that the application was not prematurely filed because the stamping device was more than 2 minutes slower than the clock used in noting the cancellation, the official times noted on the application and in the tract book must be accepted as conclusive in the absence of positive evidence showing the times to be wrong.

Margaret A. Andrews, Charles B. Gonsales, A-27328 (Feb. 4, 1957) 64 I. D. 9

A regulation which provides that where a noncompetitive oil and gas lease is relinquished the land shall become available for the filing of new lease offers upon the notation of the relinquishment on the appropriate tract book is applicable even where the notation does not take

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

place until after the end of what would have been the 5-year term of the lease in the absence of the relinquishment, and an application filed after that time but prior to the notation is prematurely filed and must be rejected.

An application to lease land filed prior to the notation on the appropriate tract book of the relinquishment of a prior lease on the same land must be rejected because the land is not available for further leasing until such notation is made.

Edward A. Gribi, Jr., Melvin A. Brown, A-27420 (Mar. 4, 1957)

An application for a noncompetitive oil and gas lease is properly rejected where the lands applied for are embraced in an existing oil and gas lease at the time the application is filed.

Robert Robinson, A-27422 (Mar. 19, 1957)

An offer to lease lands for oil and gas purposes accompanied by insufficient rent to cover the lands described in the offer may not be rejected as to part of the lands described in the offer in order that the rental payment submitted with the offer will be sufficient to cover the remaining lands.

Where an oil and gas lease offer is rejected because sufficient rent did not accompany the offer and the offeror appeals on the ground that the lands described in the offer are not the lands sought by the applicant, the appeal constitutes, in effect, an amendment of the offer.

In the absence of anything to the contrary appearing in an offer for an oil and gas lease, it is proper to assume that an offer describing lands according to the official plat of survey is an offer to lease the described lands as shown by that plat.

It is proper to reject an application for an oil and gas lease where the land sought is not described with sufficient clarity to identify it.

Sidney A. Martin, C. C. Thomas, A-27410 (Apr. 1, 1957) 64 I. D. 81

An application for a noncompetitive oil and gas lease filed in the interim between the relinquishment of a prior lease of the same land and the notation of the relinquishment on the tract book is prematurely filed and must be rejected.

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

A regulation which provides that where a noncompetitive oil and gas lease is relinquished the land shall become available for the filing of new lease offers upon the notation of the relinquishment on the appropriate tract book is applicable even where the notation does not take place until after the end of what would have been the 5-year term of the lease in the absence of the relinquishment, and an application filed after that time but prior to the notation is prematurely filed and must be rejected.

A regulation which provides that where a noncompetitive oil and gas lease is relinquished the land shall become available for the filing of new lease offers upon the notation of the relinquishment on the appropriate tract book is not complied with by notation of the relinquishment on the serial register and oil and gas plat records of the land office and an application filed after notation on these records but before notation is made on the tract book is prematurely filed and must be rejected.

Willie M. Cortes, Carl Dry, A-27438 (June 10, 1957)

Where an oil and gas lease application is filed jointly by two persons, one signing on his own behalf and as attorney-in-fact for the other, and the application is not, as to the asserted principal only, in compliance with the regulations and instructions in a matter that requires it to be rejected and returned without affording the applicants priority, it will not be considered as the sole application of the other applicant, but will be rejected in its entirety and will not earn any of the applicants any priority.

W. H. Burnett et al., A-27453 (June 24, 1957) 64 I. D. 230

An oil and gas lease offer under the act of February 25, 1920 (30 U.S.C. sec. 181), filed subsequent to the filing of a proper reservoir site application under the act of March 3, 1891 (43 U.S.C. sec. 946), or to the construction of a reservoir, must be rejected as to the land in the site and the lease when issued should exclude that land. The oil and gas in the area so excluded may be leased only under the act of May 21, 1930 (30 U.S.C. secs. 301-306), to the holder of the site.

Whether Either an Application Under Section 18 of the Act of March 3, 1891 (26 Stat. 1101; 43 U.S.C. sec. 946), for a Reservoir Site or the Construction of a Reservoir on Unsurveyed Lands Bars Issuance of an Oil and Gas Lease Under the Act of 1920 (30 U.S.C. sec. 181 et seq.), M-36446 (June 25, 1957) 64 I. D. 251

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

The fact that an application for an oil and gas lease is filed minutes after the cancellation of a prior lease is noted upon the tract book does not by itself warrant any conclusion that the filing is the result of illegitimate prearrangement, scheme or artifice.

The fact that a husband withdraws an oil and gas lease offer only after his wife has filed an offer, in her own name, covering the same land does not of itself require that her offer be rejected.

Duncan Miller et al., A-27457 (June 26, 1957)

"Associations of such persons" as used in section 1 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 181), means a plurality of persons acting in association rather than associations as entities.

A minor may not take and hold a lease in his own right except through a guardian or trustee and this limitation of right applies equally whether the minor is a member of an association or is an individual applicant (offeror).

A partnership as such cannot take and hold oil and gas leases under the mineral leasing laws of the United States. An application (offer) filed by a partnership should be considered and treated as an application (offer) by an association of citizens.

Can a Partnership Composed Partly of Minors Be a Recognized Applicant for Oil and Gas Leases? M-36463 (Aug. 30, 1957)
64 I. D. 351

It is proper to reject an application for a noncompetitive oil and gas lease after it has been determined that a prior application for a lease on the same land is an allowable application and that the first applicant is qualified to hold a lease.

Where one appeals from the rejection of his oil and gas lease offer and subsequently files a withdrawal of his appeal with a request that a lease be issued to him, the withdrawal will not be considered to be an abandonment of the appeal and acquiescence in the rejection of the offer where the circumstances show that such was not the intention of the offeror.

B. M. Shotkin, A-27469 (Sept. 24, 1957)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

An application for a noncompetitive oil and gas lease filed in the interim between the relinquishment of a prior lease of the same land and the notation of the relinquishment on the tract book is prematurely filed and must be rejected.

A regulation which provides that where a noncompetitive oil and gas lease is relinquished the land shall become available for the filing of new lease offers upon the notation of the relinquishment on the appropriate tract book is applicable even where the notation does not take place until after the end of what would have been the 5-year term of the lease in the absence of the relinquishment, and an application filed after that time but prior to the notation is prematurely filed and must be rejected.

Lily L. Pearson et al., A-27505 (Nov. 15, 1957)

Where an oil and gas lease is automatically terminated because of the lessee's failure to pay the annual rental when due, the land in the lease is not available for the filing of offers to lease until the termination is noted on the tract book.

W. V. Moore, A-27497 (Nov. 19, 1957)
64 I. D. 419

In order to have segregative effect so as to prevent land from being open to filing, an application for a 5-year extension of an oil and gas lease covering the land must be filed by the record titleholder of the lease, an assignee whose assignment has been filed for approval, an operator whose operating agreement has been filed for approval, or one who purports to act as agent for any of these persons.

Earl C. Hartley et al., A-27437, A-27446, A-27447 (Jan. 13, 1958) 65 I. D. 12

An applicant for a noncompetitive oil and gas lease who filed his offer prior to the amendment of the Mineral Leasing Act by the act of July 29, 1954, had no right to have a lease issued to him after that date subject only to the provisions of the Mineral Leasing Act as it existed prior to the amendments of that date, and the Secretary of the Interior had no authority to issue a lease after July 29, 1954, free from the amendments made on that date merely because the offer for the lease was filed prior to that date.

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

An applicant for an oil and gas lease acquires no vested right to have a lease issued but only an inchoate right to receive a lease over a later applicant if a lease is issued.

United Manufacturing Company et al., A-27608 (Mar. 5, 1958) 65 I. D. 106

An oil and gas lease application for unsurveyed land which purports to tie the metes and bounds description to a monument of the public land survey on a nonexistent corner is defective and is properly rejected.

The fact that in a prior decision rejecting an oil and gas application to lease unsurveyed land the manager assumed the location for an improperly described corner to be in the position the applicant intended does not correct the defect and the application remains subject to rejection at any time the defect is discovered.

Duncan Miller, A-27535 (Mar. 10, 1958)

An acquired lands oil and gas lease offer is properly rejected where the land description is insufficient to identify the lands applied for.

Duncan Miller, A-27566 (Apr. 29, 1958)

Where land is shown in the tract book as being included in an outstanding oil and gas lease and the lease in fact has been relinquished and a second lease has been issued for the land and also terminated, all without any notation in the tract book of the termination of the first lease and of the issuance and termination of the second lease, the land does not become available for filing subsequent to the termination of the second lease.

Where land is shown in the tract book as being included in an outstanding oil and gas lease and the lease in fact has been relinquished and a second lease has been issued for the land and also terminated, and the tract book shows the termination of the second lease but not the termination of the first lease, the land does not become available for filing subsequent to the notation of termination of the second lease.

Max L. Krueger, Vaughan B. Connelly, A-27522 (Apr. 30, 1958) 65 I. D. 185

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

A regulation which provides that where a noncompetitive oil and gas lease is relinquished the land shall become available for the filing of new lease offers upon the notation of the relinquishment on the appropriate tract book is applicable even though the notation on the tract book of the existence of a prior lease may not have been made until the same date that a relinquishment of the lease was noted, and an application filed prior to the notation of the relinquishment is prematurely filed and must be rejected.

An oil and gas application filed prior to the notation on the appropriate tract book of the relinquishment of a prior lease on the land applied for must be rejected because the land is not available for further leasing until such notation is made.

William V. Moore, A-27540 (May 13, 1958) 65 I. D. 227

A noncompetitive oil and gas lease application for unsurveyed land in Alaska is properly rejected where the land description is not given in relation to true cardinal directions and is insufficient to identify the lands applied for.

George Sabolsice, A-27548 (May 23, 1958)

Where a lease is offered to an applicant subject to a restricted drilling provision, whether the applicant will be able to operate the lease in accordance with the restriction is a matter pertaining to performance of lease obligations and not to his qualifications as an applicant for the lease.

Humble Oil and Refining Company, A-27568 (May 29, 1958) 65 I. D. 257

An offer for oil and gas lease covering less than 640 acres is properly rejected as being in violation of the departmental regulation requiring that an offer be for not less than 640 acres even though the offeror states his willingness to amend the offer to include any adjacent lands available for leasing.

Duncan Miller, A-27598 (June 23, 1958)

A noncompetitive oil and gas lease application is properly rejected where it is determined that a lease issued on a prior application for the same land was properly issued.

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

A regulation of the Department which provided that where a tract of land of less than 640 acres was isolated as the result of a partial relinquishment of a lease no lease offer for the relinquished land would be received for a period of 60 days from the date the partial relinquishment was filed, did not apply where the tract was isolated by virtue of the fact that it was surrounded by lands patented without a mineral reservation to the United States before the partial relinquishment was filed.

Melvin A. Brown, Blanche W. Sweeney, A-27580 (June 27, 1958)

43 CFR 192.42(d)(2), which formerly provided that where a tract of less than 640 acres was isolated as a result of the partial relinquishment of a lease, no lease offer would be received for the relinquished land for 60 days after the date of filing the partial relinquishment, does not bar the inclusion of such isolated tracts in an offer covering over 640 acres which is filed prior to the end of the 60-day period.

Edward C. Donohue, A-27543 (June 27, 1958)

An application for a noncompetitive oil and gas lease of lands patented under a railroad land grant must be rejected because the United States does not own such lands or the mineral deposits in the lands.

Patricia T. Zebal et al., A-27616 (July 18, 1958) 65 I. D. 293

A lessee of an oil and gas lease in its final extended term who relinquishes his lease is not thereby disqualified from applying for a new lease of the same lands.

Duncan Miller, A-27620 (July 28, 1958)

The regulation (43 CFR 192.42(d)(2)), which fixes a minimum area of 640 acres for oil and gas lease offers unless a less area is surrounded by lands not available for leasing does not apply to submerged lands excluded from the upland by meander lines of the public survey unless such submerged lands have been determined to be beneath waters that are not navigable.

Applicability of 43 CFR 192.42(d)(2) to Beds of Non-Navigable Waters Adjacent to Public Lands, M-36512 (July 29, 1958)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

A lessee of an oil and gas lease who relinquishes his lease is not thereby disqualified from applying for a new lease of the same lands.

Duncan Miller, A-27649, A-27653, A-27665, A-27713, A-27760, A-27764 (Aug. 6, 1958)

An applicant applying for non-competitive oil and gas leases on lands subject to leasing under the Mineral Leasing Act of February 25, 1920, as amended, need only describe the lands within the United States in accordance with the regulations contained in 43 CFR 192.42(d), Circular 2002.

If an oil and gas lease describing lands by metes and bounds description does not embrace all the lands in a subdivision that is established by a subsequent official survey, the unleased lands within that subdivision may be considered available for leasing provided that the Department determines that the leasing of the unleased lands will be in the public interest.

Noncompetitive Oil and Gas Lease Applications and Leases on Unsurveyed Public Lands Within the United States Under the Mineral Leasing Act of February 25, 1920, as Amended, M-36542 (Aug. 8, 1958)

(Memorandum from Regional Solicitor, Denver, Colorado, to Area Administrator, Area 3, Bureau of Land Management, Denver, Colorado, August 8, 1958.)

The fact that relinquished leases were issued before section 30(b) was added to the Mineral Leasing Act by the act of August 8, 1946, and that the lessees under the relinquished leases may not have filed an election to have their leases governed by the 1946 act provides no basis for holding that the relinquished lands automatically became available for further filing at the expiration of the lease terms where the relinquishments had not been noted on the tract books by that time.

An oil and gas lease offer which was filed in 1953 for lands included in prior leases which were relinquished is properly rejected where the offer was filed before the relinquishments were noted on the tract books even though the offer was not filed until after the date on which the relinquished leases would have expired by operation of law if they had not previously been relinquished.

Eugene C. Paine, A-27632 (Aug. 21, 1958)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Where an offeror describes a tract of unsurveyed land by reference to nonexistent corners of an unofficial survey created by projection on an 1898 map whose topographical features have been greatly altered by time and by words referring to existing features and it is not possible to identify the land applied for without consulting other maps and records, which have not been filed with the offer and are not part of the record in the case, the offer must be rejected for failure to identify the land applied for when a proper intervening offer has been filed.

Where an oil and gas lease offer for an unsurveyed tract of land contains a metes and bounds description consisting partly of references to natural features of topography and partly to the lines of unofficial sections created by projection, but the offer is accompanied by an up-to-date map on which is shown in great detail natural and artificial structures, contour lines, degrees of latitude and longitude, and other items, and on which the areas applied for are clearly demarcated and where the area applied for can be accurately located on the earth's surface, the metes and bounds description is not defective because it is not limited solely to lines connecting natural and artificial monuments.

An oil and gas offer for unsurveyed public land which does not tie the metes and bounds description to a corner of a public land survey, as required by the pertinent regulation, is defective and earns the offeror no priority.

Where a metes and bounds description of an unsurveyed tract in an oil and gas lease offer is tied to the corner of an approved public land survey and where it is possible to identify the area applied for accurately from the words of description in the offer and an accompanying map which is part of the offer, the fact that the corner used as a tie may no longer be existent does not render the offer invalid.

Henry S. Morgan et al., A-27529 (Aug. 27, 1958) 65 I. D. 369

Land included in an oil and gas lease which is automatically terminated because of the lessee's failure to pay the annual rental within the time allowed does not become available for further leasing until the termination of the lease is noted on the tract book.

Wilma Elliott Donohue, A-27652 (Sept. 11, 1958)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Where a group of leases has been issued which covers practically all of an unsurveyed island, it is proper to refuse to issue leases for isolated tracts which may have been omitted from the original leases, whose existence and size cannot be determined until after survey and adjustment of the boundaries of the existing leases, especially when there is no compelling public interest in issuing other leases.

Richfield Oil Corporation, A-27697 (Oct. 23, 1958)

An offer to lease two islands, the combined acreage of which is less than 640 acres, is acceptable where it is shown that the islands are completely surrounded by tide lands not subject to lease under the terms of the Mineral Leasing Act.

An offer to lease unsurveyed islands in Alaska which are not within 2 miles of an approved public survey corner, which offer identifies the islands by name and further fixes their location by naming the surrounding waters, is a sufficient identification of the lands sought to warrant the issuance of an oil and gas lease thereon where the islands, by name, and the surrounding waters are shown on charts of governmental agencies available to the land office.

Layton A. Bennett et al., A-27659 (Nov. 3, 1958)

An offer for oil and gas lease covering 160 acres of land entirely surrounded by land in private ownership in which the United States has not reserved the minerals is not in violation of the departmental regulation requiring an offer to be for not less than 640 acres of land except where the land is surrounded by lands not available for leasing.

Duncan Miller, A-27718 (Nov. 7, 1958)

An application for a noncompetitive oil and gas lease of unsurveyed public lands is properly rejected where the applicant fails to describe the lands applied for by metes and bounds.

Roy W. Cook, Duncan Miller, A-27720 (Nov. 7, 1958)

Where an oil and gas offeror accepts an erroneous refund of the advance first year's rental while he has pending an appeal from the rejection of his offer, his offer is not thereafter

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

in good standing and cannot earn him priority over other proper applications filed before he tenders repayment of the rentals.

Duncan Miller, A-27683 (Nov. 10, 1958)

An application for a noncompetitive oil and gas lease is properly rejected where the lands applied for are embraced in an existing oil and gas lease at the time the application is filed.

Duncan Miller, A-27728 (Nov. 12, 1958)

An oil and gas lease offer for less than 640 acres is properly rejected pursuant to a regulation of the Department which requires an oil and gas lease offer to include at least 640 acres unless certain conditions recognized as exceptions prevail and the offer does not come within the exceptions.

Halvor F. Holbeck et al., A-27704 (Nov. 18, 1958)

Indian trust patents or fee patents of record, even if they are invalid or void, segregate the land so as to make it not available for oil and gas leasing, and applications filed for such lands must be rejected.

Availability of Lands for Oil and Gas Leasing--Boundaries of the Fort Peck Indian Reservation, M-36539 (Nov. 19, 1958)

Where an oil and gas applicant accepts a refund of the first year's rental, his application is not thereafter in good standing and cannot earn him priority over other proper applications filed before he tenders repayment of the rental.

Duncan Miller, A-27693 (Dec. 3, 1958)

An application for a noncompetitive oil and gas lease of unsurveyed land is properly rejected where the metes and bounds description of the land sought to be leased is insufficient to identify the lands because the description does not close.

Duncan Miller, A-27784 (Dec. 22, 1958)

A lessee of an oil and gas lease who relinquishes his lease is not thereby disqualified from applying for a new lease of the same land.

Duncan Miller, A-27810 (Jan. 16, 1959)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

The fact that public land is covered by an outstanding application for an oil and gas lease does not render it not available for leasing within the meaning of the regulation requiring that, with certain exceptions, an application for an oil and gas lease include not less than 640 acres.

Lands embraced within an oil and gas lease offer cease to be lands available for leasing within the meaning of 43 CFR 192.42(d) on the date the offer is signed by an authorized officer of the United States even though the lease does not become effective until the first of the following month.

R. S. Prows, A-27726 (Jan. 26, 1959)
66 I. D. 19

Where the regulation in effect at the time an amendment to a defective application is filed requires that an oil and gas lease be issued on a specific form, it is proper to require the lessee to accept a lease on that form even though the regulation in effect when the application was first filed and which would have been controlling if the application were not defective, required the use of another form.

D. Miller, A-27794 (Jan. 29, 1959)

An offer to lease for oil and gas lands in which the United States does not have any interest in the mineral deposits must be rejected.

A noncompetitive offer to lease for oil and gas lands patented under a railroad grant in which the United States has no interest in the lands or mineral deposits in them must be rejected.

H. S. Davis et al., A-27758, A-27849, A-27858 (Jan. 30, 1959)

Land included in an outstanding oil and gas lease is not available for leasing to others and an application filed for such land must be rejected regardless of whether the outstanding lease was or was not properly extended.

R. M. Young, Jr., Mary R. Sivley, A-27640 (Jan. 30, 1959)

Where an oil and gas lease offer filed for land claimed to be in a relinquished railroad right-of-way is rejected for the reason that no notation has been made in the tract book of the relinquishment, the rejection will be suspended where the offeror shows that there is a notation

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

of a relinquishment apparently in connection with the right-of-way and the case will be remanded for a determination of the facts respecting the apparent relinquishment and the status of the land.

Frank M. Gallivan, A-27830 (Feb. 4, 1959)

As a matter of administrative practice the Department may, subject to valid intervening applications, permit oil and gas lease applications for acquired lands which were defective when filed to be processed as though the defect had been corrected by the applicant when, by reason of the amendment of a regulation after the application was filed, the application is no longer defective.

Nettie M. Lewis et al., A-27848 (Mar. 3, 1959)

Where the pertinent regulation states that offers to lease for oil and gas will be rejected if filed prior to the notation in the tract book of the termination of a former lease covering the same lands, an offer which the records show to have been filed at the same time as the notation of termination was made in the tract book will not be rejected.

Eugenia Bate et al., A-27861 (Mar. 3, 1959)

A noncompetitive oil and gas lease offer is properly rejected as to lands applied for which are included in an existing oil and gas lease.

Bruce Sweeney, A-27854 (Mar. 4, 1959)

Where lessees timely filed applications for extension of their leases and, thereafter, before the end of the primary lease terms, relinquished the leases, as a consequence of which no right to an extension of the leases survived, the lands nonetheless remained unavailable for further leasing until after the notation of the tract books showing the final action taken on the extension applications.

Elmer F. Garrett, A-27819 (Mar. 24, 1959)
66 I. D. 92

A lessee of an oil and gas lease who relinquishes his lease is not thereby disqualified from applying for a new lease of the same lands.

Duncan Miller, A-27897, A-27914, A-27923, A-27930, A-28003, A-28014 (Mar. 31, 1959)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

An offer for a noncompetitive oil and gas lease is properly rejected where the lands applied for are embraced in an existing oil and gas lease.

Where there is an approved corner of the public land survey within two miles, an offer for a noncompetitive lease of unsurveyed lands in Alaska which is not connected to that corner is defective and earns the offeror no priority.

Stephen P. Dillon, Martha M. Roderick, A-27880 (Apr. 7, 1959) 66 I. D. 148

Oil and gas lease applications pending when the plats of survey of school sections are accepted do not prevent attachment of the grant to the State of such school sections under the act of January 25, 1927, as amended by the acts of April 22, 1954, and July 11, 1956, even though the applications are filed 3 days before the acceptance of the plats of survey.

Mrs. Virginia E. Lewis, Max B. Lewis, A-27902 (May 8, 1959) 66 I. D. 204

Where a lease offer is received in the land office over the counter prior to the time the land office opens for official business and is not returned to the offeror, it is to be considered as simultaneously filed at the time the land office opens with another lease offer for the same land, even though the latter offer is stamped as received one minute before the first offer, and a drawing must be held to determine the priority of the two offers.

P. A. McKenna, A-27909 (May 18, 1959)

The fact that public land is covered by an oil and gas lease offer does not make such land unavailable for leasing within the meaning of the regulation which requires that, with certain exceptions, an oil and gas lease offer must include not less than 640 acres.

An oil and gas lease offer which includes less than 640 acres is properly rejected as a violation of the departmental regulation requiring that an offer be for not less than 640 acres.

Frank Perew, Jr., Josephine E. Perew, A-27915 (May 19, 1959)

Where the regulation governing the availability of lands for further leasing provided that, subject to certain exceptions, lands included in a relinquished lease become available for new lease offers immediately upon the notation of the relinquishment of the prior lease on the

APPLICATIONS--Continued

tract book, an offer for lands relinquished from prior leases was not prematurely filed where the records indicate that the notation of the relinquishments on the tract book and the filing of the offer occurred simultaneously.

Duncan Miller, A-27911 (May 21, 1959)

A noncompetitive oil and gas lease application for lands embraced in an outstanding oil and gas lease is properly rejected whether the lease is valid, void, or voidable.

Allan A. Stramler, Jr., A-27949 (Jun. 15, 1959)

An application for an oil and gas lease of unsurveyed land is properly rejected because of an outstanding lease issued in response to an offer to lease the same land even though the metes and bounds description of the leased land does not cover the land in the subsequent offer but is followed by a reference to the legal subdivision of land to result from survey which is the same as that shown by both the metes and bounds description and the reference to a future subdivision in the lease offer preceding issuance of such lease.

A noncompetitive oil and gas lease offer is properly rejected where it is determined that a lease issued on a prior offer for the same land was properly issued.

Andrew Ronald Nerland et al., A-27962 (Jun. 29, 1959)

A public land survey corner which has never been surveyed, but whose position may be established by protraction, is not a "permanent monument" to which a metes and bounds description in an oil and gas lease application for unsurveyed land in Alaska can be tied.

Albert Stevenson, Alexander S. Dunham, A-27953 (Jun. 30, 1959)

A description in an acquired lands oil and gas lease offer for a tract of unsurveyed land which uses as part of the boundary a line drawn on a map prepared by the acquiring agency, but which does not give the course or distance for such line, is incomplete and is not a complete and accurate description of the land applied for.

An acquired lands oil and gas lease offer which described a tract of unsurveyed land in terms of the tract number given it when it was acquired by the United States, the outside boundary of the tract, as surveyed by the acquiring agency, and lines run from points on the outside boundary to other points on the outside boundary

APPLICATIONS--Continued

by courses and distances, and which had, as part of the description, a map used by the agency administering the land on which the parts of the tracts desired are marked out, complied with the regulation in effect at the time the offer was filed.

An oil and gas lease offer must be rejected with loss of priority when it fails to comply with a mandatory requirement of the regulations unless such failure is specifically excused by the regulations.

Celia R. Kammerman et al., A-27768 (July 17, 1959) 66 I. D. 255

A regulation providing that, to determine the order in which simultaneously filed applications will be processed, all such applications which conflict in whole or in part will be included in a drawing does not authorize a drawing of simultaneously filed oil and gas lease offers, some of which are and some of which are not in conflict in whole or in part as to the lands described in the applications.

A drawing is properly set aside where it included simultaneously filed offers for oil and gas leases some of which were and some of which were not in conflict in whole or in part.

Henry S. Morgan, Edwin W. Stockmeyer, A-28004 (July 30, 1959) 66 I. D. 278

The regulation which provides that a document required to be filed within a stated period, the last day of which falls on a nonbusiness day, is timely filed if it is filed on the next business day the office is open to the public, permits additional time for filing an application for extension of a noncompetitive oil and gas lease when the expiration of the primary term of the lease falls on a nonbusiness day, but during that additional time, the land formerly covered by the lease is not segregated solely because an application for extension may be filed; if an application for extension is not timely filed, the land is available for new offers on the first day following the expiration date of the primary term of the lease even though the expiration date fell on a nonbusiness day.

Malcolm C. Petrie, A-28006 (July 31, 1959) 66 I. D. 288

An application for a noncompetitive oil and gas lease is properly rejected where the lands applied for are later leased to a prior applicant for the lands.

Duncan Miller, A-27959 (Aug. 3, 1959)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

One who applies for land in a relinquished lease is not disqualified to do so simply because he knew that the prior lease was to be relinquished.

An application for a noncompetitive oil and gas lease is properly rejected where the land applied for is later leased to a prior applicant for the land.

Duncan Miller, A-27959-A (Aug. 3, 1959)

An oil and gas lease offer for lands covered by an outstanding lease must be rejected.

Duncan Miller, A-27986 (Aug. 4, 1959)

An offer for a noncompetitive oil and gas lease is properly rejected where the offeror fails to tender the full first year's rental with the application and the amount of rental tendered is deficient by more than 10 percent of the proper amount due.

William Dittman, A-27972 (Aug. 4, 1959)

An offer to lease public land for oil and gas purposes is converted into a lease when signed on behalf of the United States and the rental payment for the first year of the lease submitted with the lease offer is fully earned so that withdrawal of the offer and refund of the rental payment is not permissible.

Duncan Miller, A-28001 (Aug. 5, 1959)

An oil and gas lease is properly held for cancellation where it was issued pursuant to an application for less than 640 acres which did not include adjoining lands available for leasing at the time when the application was filed, as required by regulation, and where a subsequent, acceptable application was pending when the lease was issued.

F. W. C. Boesche, A-27997 (Aug. 5, 1959)

Lands included in desert land entries not impressed with a reservation of oil and gas are subject to filing of offers for oil and gas leases and where the lands are determined to be prospectively valuable for oil and gas as the result of such an offer a lease may properly be issued to the offeror and subsequent applications are properly rejected.

Joseph S. Rose, Jr., Thomas C. Moran, A-27929 (Aug. 10, 1959)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

An oil and gas lease offer which fails to comply with the departmental regulation requiring that leased lands not exceed an area 6 miles square is entitled to priority only from the time that the defect is remedied by relinquishment of land outside a 6-mile square area.

Cecil R. Fuller, Executor of the Estate of Aileen S. Fuller, A-28020 (Aug. 11, 1959)

An oil and gas lease offer which includes less than 640 acres is properly rejected as in violation of the departmental regulation requiring that an offer be for not less than 640 acres.

A regulation which requires that, with certain exceptions, an offer for a noncompetitive oil and gas lease under the Mineral Leasing Act must include not less than 640 acres is a reasonable exercise of the discretion vested in the Secretary of the Interior by the Mineral Leasing Act.

The manager of a land office has no duty or authority to correct an erroneous description of land in an oil and gas offer so as to make the offer a valid one.

W. H. Burnett, William Weinberg, A-28037 (Aug. 20, 1959)

An oil and gas lease offer which includes less than 640 acres of land is properly rejected as in violation of the departmental regulation requiring that an offer be for not less than 640 acres.

A regulation which requires that, with certain exceptions, an offer for a noncompetitive oil and gas lease under the Mineral Leasing Act must include not less than 640 acres is a reasonable exercise of the discretion vested in the Secretary of the Interior by the Mineral Leasing Act.

W. H. Burnett, William Weinberg, A-28046 (Aug. 31, 1959)

An acquired lands oil and gas lease offer which described a tract of unsurveyed land in terms of the tract number given it when it was acquired by the United States, the outside boundary of the tract, as surveyed by the acquiring agency, and a line run from a point on the outside boundary to another point on the outside boundary by course and distance, and which had, as part of the description, a map used by the agency administering the land on which the part of the tract desired was marked out, complied with the regulation in effect at the time the offer was filed.

An offer to lease for oil and gas which does not contain a description sufficient to identify the land is properly rejected with loss of priority.

APPLICATIONS--Continued

A description in an acquired lands oil and gas lease offer for a tract of unsurveyed land which uses as part of the boundary a line drawn on a map prepared by the acquiring agency, but which does not give the course or distance for such line, is incomplete and is not a complete and accurate description of the land applied for.

Merwin E. Liss, A-27924, A-27940 (Aug. 31, 1959)

A request for reinstatement of an offer for an oil and gas lease which the offeror has withdrawn constitutes a new filing which must comply with the requirements of the regulations, including the payment of a filing fee, to earn the offeror priority.

Paul D. Haynes, A-28043 (Sept. 21, 1959)
66 I. D. 332

One who applies for land in a relinquished lease is not disqualified to do so simply because he knew that the prior lease was to be relinquished.

An application for a noncompetitive oil and gas lease is properly rejected where the land applied for has been leased to a prior applicant for the land.

Duncan Miller, A-28057 (Oct. 16, 1959)

Under the regulations in effect in 1957 offers for unsurveyed land in Alaska were required to connect the description of the land applied for to an approved public land survey corner only if the land was within 2 miles of a public land survey corner and where the land was not within 2 miles of an approved public survey corner it had to be connected with such permanent monument as would enable the Bureau of Land Management to identify its location from the Bureau's maps and records.

A monumented triangulation station identified as a "VABM 'Flat' 253" "west of and in the vicinity of Iliamna Lake" is a sufficient description of a permanent monument within the meaning of 43 CFR, 1954 Rev., 71.2(a)2.

Where an offer for a noncompetitive oil and gas lease for unsurveyed lands ties the land applied for to two separate permanent monuments in such a way that the points of beginning computed from each do not coincide, and the second tie is stated in parentheses as a further identification of the first point of beginning, the offer is to be considered on the basis of the first tie, the second being disregarded as surplusage.

Edgar Paul Boyko, Milton H. Lightwood, Jr., A-28049 (Oct. 30, 1959)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

A lessee of an oil and gas lease who relinquishes his lease or permits it to be canceled is not thereby disqualified from applying for a new lease of the same lands, nor is a person disqualified from filing simply because he knew a prior lease on the land was to be relinquished.

Duncan Miller, A-28114, A-28136, A-28137, A-28164, A-28192, A-28223, A-28224 (Oct. 30, 1959)

Oil and gas lease offers for unsurveyed unnamed islands in Alaska are properly rejected where the description in the offers states only that the islands are located between named unsurveyed islands, named bodies of water, and the shoreline, such a description being too indefinite to identify the islands included in the offer; and oil and gas lease offers for portions of unsurveyed named islands in Alaska are properly rejected where the portion of the island desired is described only by quantity of land and by stating the direction of the land applied for from one outside boundary.

Where an offer contains an indefinite description as to certain unsurveyed lands applied for, but other lands in the offer are properly described, the offer may be accepted as to the properly described lands, all else being regular.

Where an oil and gas lease offer includes certain lands which are properly described and others which are indefinitely described and the indefiniteness of the description of part of the land makes impossible a determination whether the entire offer describes land which can be contained in a 6-mile square area, and the description in the offer does not violate the 6-mile square requirement, the offer is not subject to rejection for violation of the 6-mile square rule.

Where the exact acreage covered by an oil and gas lease offer cannot be determined because certain unsurveyed lands included in the offer cannot be identified as a result of the indefinite description of such lands, but other lands covered by the offer are properly described, and where it cannot probably be said that the total acreage in the offer exceeds 2,560 acres, the offer is not subject to rejection for violation of the 2,560-acre rule.

Where the amount of rental submitted with an offer appears to be sufficient, but this cannot be positively determined because a part of the land covered by the offer is inadequately described, and the rental submitted is more than sufficient for land included in the offer which is

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

properly described and cannot be said to be insufficient for all the land included in the offer, the offer is not subject to rejection on the ground that insufficient rental was submitted.

Duncan Miller, A-28035 (Oct. 30, 1959)
66 I. D. 370

Land included in an outstanding oil and gas lease which has been extended by the manager is not available for leasing to others and an application filed for such land must be rejected regardless of whether the outstanding lease was or was not properly extended.

Duncan Miller et al., A-28120 (Nov. 9, 1959)
66 I. D. 380

A noncompetitive oil and gas lease offer for 2,560 acres is properly rejected in its entirety where 2,240 acres of the land applied for are withdrawn from mineral leasing and other land adjoining the remaining 320 acres was available for leasing at the time the application was filed.

The fact that public land is covered by an outstanding application for an oil and gas lease does not render it not available for leasing within the meaning of the regulation requiring that, with certain exceptions, an application for an oil and gas lease include not less than 640 acres.

Janis M. Koslosky, A-28103 (Nov. 10, 1959)
66 I. D. 384

Offers to lease for oil and gas for lands covered by an oil and gas lease in its extended term must be rejected, whether the extension is valid or not, because such lands are not open to filing until the cancellation or termination of the lease has been noted on the tract book.

Where the Geological Survey reports to the manager that a lease is extended by reason of production and the manager so notes the serial register page, the lands covered by the lease are not available for further leasing until the termination of the lease is noted in the tract books, even though in fact production on the lease had ceased prior to the termination of the primary term of the lease.

Duncan Miller, Louise Cuccia, A-28059 (Nov. 17, 1959) 66 I. D. 388

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

An oil and gas lease offer is properly rejected as to surveyed lands which are not described in conformity with the most recent plat of survey.

Doris L. Ervin et al., A-28106 (Nov. 20, 1959)
66 I. D. 393

Land included in an outstanding oil and gas lease which has been extended by the manager is not available for leasing to others and an application filed for such land must be rejected regardless of whether the outstanding lease was or was not properly extended.

M. Blaine Peterson, A-28111 (Nov. 23, 1959)

ASSIGNMENTS OR TRANSFERS

Where portions of the lessor's leased estate are conveyed to others a discovery by the lessee of oil or gas on any such portion will extend the entire lease.

Where different parcels of lands in a lease are separately owned the royalties on production from the discovery well are payable to the owner of the minerals in the land on which the well is situated and they are not subject to apportionment between the several owners of the leased land.

Status of a Lease After Sale of Part of the Leased Premises to Others Than the Original Lessee, M-36269 (Mar. 24, 1955)

The attempted assignment of an oil and gas lease after the record titleholder thereof has served as Member of Congress for more than a year or after his term as Congressman has ended is ineffective even though such assignments are purportedly approved by employees of the Bureau of Land Management.

John E. Miles, A-27075, A-27144 (April 11, 1955) 62 I. D. 135

A partial assignment of a lease made during the period of the single 5-year extension provided for in section 17 of the act of August 8, 1946 (60 Stat. 955), and prior to the act of July 29, 1954, is valid.

ASSIGNMENTS OR TRANSFERS--Continued

A separate lease created by an assignment of part of the acreage in a lease pursuant to the provisions of the act of July 29, 1954 (68 Stat. 585; 30 U.S.C., Cum. Supp., 187(a)), where the lease is in its extended term by reason of any provision of the Mineral Leasing Act, as amended, is not limited to the 2-year extension prior to the production of oil and gas in paying quantities resulting from such assignment if, were it not for the assignment, the original lease would have continued longer without such production.

Partial Assignment of Oil and Gas Leases in Extended Term, M-36278 (May 31, 1955)
62 I. D. 216

As the first day of the lease month following the filing of an assignment of an oil and gas lease is the earliest date upon which an assignment can take effect, an assignor is not divested of his interest in the assigned acreage at least until that date.

Acreage included in pending assignments of oil and gas leases in favor of an offeror must be charged to the acreage account of the offeror in determining the offeror's qualifications to receive a lease.

Where approval of an assignment of an oil and gas lease is not given until after the first day of the lease month following the filing of the assignment the acreage covered by the assignment remains charged to the acreage account of the assignor until the approval date.

Albert C. Massa et al., A-27158 (Sept. 6, 1955)
62 I. D. 339

Where the pertinent regulation requires the payment of a fee upon the filing of an assignment of a royalty interest in an oil and gas lease, there is no reason to return a fee so paid because, contrary to the assignee's expectation, no approval of the assignment was given because there was no discovery upon the lands covered by the lease.

The provisions of 43 CFR, 1953 Supp., 192.145, relating to the assignment of royalty interests did not require that such assignments of more than one percent be approved prior to the discovery of oil or gas on the lease involved.

Neil F. Stull, A-27220 (Feb. 15, 1956)

ASSIGNMENTS OR TRANSFERS--Continued

An assignment of an oil and gas lease is ineffective unless it is approved, and until an assignment is approved, the assignor is responsible for the performance of all obligations under the lease.

Lester C. Hotchkiss, Alpha L. Hotchkiss, A-27342 (Aug. 14, 1956)

Acreage included in assignments of interests in oil and gas leases not yet issued remains charged to the acreage account of the assignor until the leases are issued and the assignments are approved.

Where an assignment of an oil and gas lease is not approved during the month in which the assignment is filed, the acreage covered by the assignment remains charged to the assignor's acreage account only until the subsequent approval date. To charge the assignor's acreage account with that acreage after that approval date is error.

Albert C. Massa et al., A-27158 (Supp.) (Aug. 28, 1956)
63 I. D. 279

The partial assignment of oil and gas leases during their extended 5-year terms under the act of July 29, 1954 (68 Stat. 585), amending section 30a of the Mineral Leasing Act of 1920, as amended (30 U.S.C. sec. 187a), has the effect of continuing in force all segregated leases of undeveloped lands for a period of 2 years from the effective date of the assignment and so long thereafter as oil or gas is produced in paying quantities, regardless of whether such segregated leases constitute the assigned or the retained portions of the original lease.

Partial Assignment of Oil and Gas Leases Under the Act of July 29, 1954 (68 Stat. 585), Amending Section 30a of the Mineral Leasing Act of 1920, as Amended (30 U.S.C. sec. 187a), M-36398 (Dec. 14, 1956)
/Appendage to M-36432, May 13, 1957./
64 I. D. 135

A transfer of an oil and gas lease "by operation of law" upon the merger or consolidation of corporations is not an "assignment" and the fee required by 43 CFR 192.142 to be paid for the approval of an "assignment" may not be levied or collected. Where, however, the law providing for such merger or consolidation requires that any property must be conveyed by proper conveyance, the act of merging or consolidating the corporations, does not of itself result in the

transfer of the property and any oil and gas leases transferred in that connection are "assigned" within the meaning of the regulation.

Filing Fees: Transfer of Title to Oil and Gas Leases by or Through Merger or Consolidation of Two or More Corporations, M-36420 (Feb. 25, 1957)

Title to or interest in an oil and gas lease may only be assigned or transferred subject to the approval of the Secretary of the Interior.

Applicability of State Community Property Laws to Federal Oil and Gas Leases With Respect to Acreage Limitations, M-36416 (Feb. 27, 1957)
64 I. D. 44

The partial assignment of oil and gas leases during their extended 5-year terms under the act of July 29, 1954 (68 Stat. 585), amending section 30a of the Mineral Leasing Act of 1920, as amended (30 U.S.C. sec. 187a), has the effect of continuing in force all segregated leases of undeveloped lands for a period of 2 years from the effective date of the assignment and so long thereafter as oil or gas is produced in paying quantities, regardless of whether such segregated leases constitute the assigned or the retained portions of the original lease.

Partial Assignment of Oil and Gas Leases Under the Act of July 29, 1954 (68 Stat. 585), Amending Section 30a of the Mineral Leasing Act of 1920, as Amended (30 U.S.C. sec. 187a), M-36398 (Dec. 14, 1956)
/Appendage to M-36432, May 13, 1957./
64 I. D. 135

An administrative regulation allowing 90 days from the execution of an assignment of a noncompetitive oil and gas lease in which to file for approval thereof cannot have the effect of reviving a lease the term of which has already expired by operation of law. Applications for approval of such assignments must be rejected if filed after expiration of the lease term even though executed while the lease was subsisting.

Extension of Oil and Gas Leases Under the Act of July 29, 1954 (68 Stat. 583), Amending Section 30(a) of the Mineral Leasing Act of 1920, as Amended (30 U.S.C. sec. 187a), M-36443 (June 4, 1957)

OIL AND GAS LEASES--Continued

ASSIGNMENTS OR TRANSFERS--Continued

The approval of an assignment of a document filed by the parties which on its face is a valid assignment of record title will not later be vacated on the unilateral assertion of one party that the document was intended solely for collateral security purposes.

D. J. Simmons, A-27478 (Nov. 15, 1957)
64 I. D. 413

The assignment of part of the lands included in a lease during the single 5-year extension of the term allowed under section 17 of the Mineral Leasing Act, as amended, segregates the assigned and the retained portions of the lease, and, although there is no production on any part of the leased lands at the time of assignment or on the retained portion thereafter, the retained portion of the lease continues in full force and effect for a minimum period of 2 years after the sssignment, in accordance with section 30(a) of the act, as amended by the act of July 29, 1954, even though the 2-year extension will continue the segregated lease beyond the end of the 5-year extension of the original lease.

Raymond J. and Harold J. Hansen et al., A-27503 (Jan. 3, 1958)

Any assignors as well as assignees are parties in interest to a decision which vacates in part prior decisions approving their assignment of oil and gas leases, and failure to include an assignor as a party in interest to such a decision by the Acting Director of the Bureau does not defeat the right of the assignor to appeal to the Secretary therefrom.

Godfrey Nordmark, A-27602 (July 21, 1958)
65 I. D. 299

Regardless of when approval is given to an assignment of a portion of an oil and gas lease, the assignment, when approved, is effective from the first day of the lease month following the date of its filing in the proper land office.

For leases to become segregated through assignment, and thus entitled to the extension authorized for segregated leases, an assignment must be filed when there is at least one lease month remaining in the term of the lease. A partial assignment filed during the last month of the lease term cannot become effective to segregate the lease and to entitle the segregated portions to any extension. Humble Oil & Refining Company, 64 I. D. 5 (1957), distinguished. Associate Solicitor's opinion (M-36443) (June 4, 1957), overruled in part.

Franco Western Oil Company et al., A-27607 (Aug. 11, 1958)
65 I. D. 316

OIL AND GAS LEASES--Continued

ASSIGNMENTS OR TRANSFERS--Continued

Under section 30(a) of the Mineral Leasing Act, as enacted on August 8, 1946, an assignment or a sublease of an oil and gas lease cannot take effect unless three original executed counterparts thereof are filed in the proper land office, and this requirement is applicable to assignments filed for approval after that date even though the assignments were executed prior to that date.

Where there is a dispute between the parties to a transfer of interests in an oil and gas lease as to whether the transfer constitutes an assignment of record title or an operating agreement, the Department will not approve the transfer until the dispute is resolved by the parties or the courts.

Instruments in which an assignor agrees to "sell, assign, convey, transfer, and set over" portions of two leases and the assignee obtains all of the assignor's right under the leases to produce oil or gas from zones below 4,000 feet are assignments and not "subleases in the nature of operating agreements" even though, by separate agreement, the parties to the assignments mutually promise that under certain conditions either party will transfer his interest in the leases to the other party.

Richfield Oil Corporation, A-27603 (Aug. 18, 1958) 65 I. D. 348

Section 30(a) of the Mineral Leasing Act provides that an assignment of an oil and gas lease cannot take effect until three original executed counterparts thereof are filed in the proper land office.

Since a certified copy of an assignment of an oil and gas lease is not an original executed counterpart thereof, a request for approval of an assignment consisting of one proper document and two certified copies must be rejected.

Catharine D. Prigge, A-27677 (Sept. 23, 1958)

The assignment of part of the lands included in a lease during the single 5-year extension allowed under section 17 of the Mineral Leasing Act, as amended, segregates the assigned and the retained portions of the lease, and, although there is no production on any part of the leased lands at the time of the assignment or thereafter, both the assigned portion and the retained portion continue in full force and effect for a minimum period of 2 years, in accordance with section 30(a) of the Mineral Leasing Act, as amended

OIL AND GAS LEASES--Continued

ASSIGNMENTS OR TRANSFERS--Continued

by the act of July 29, 1954, even though the 2-year extension will continue the leases beyond the end of the 5-year extension of the original lease.

Richard P. De Smet et al., A-27837 (Oct. 29, 1958)

Where subsequent to the approval by the Department of an assignment of interests in an oil and gas lease at the request of the assignee it appears that there is such a dispute between the parties as to the intent and purpose of the assignment instrument that, had the Department known of the dispute the Department would not have acted on the purported assignment until the dispute between the parties has been resolved by the courts or the parties themselves, the Department will not rescind the approval but will not approve further assignments of rights stemming from the disputed assignment or permit drilling by any one claiming operating rights deriving from the disputed assignments for a period of time sufficient to permit the parties a chance to settle their dispute by agreement or litigation.

Newton Oil Company et al., A-27662 (Dec. 17, 1958)

A partial assignment of an oil and gas lease, when approved, creates two separate leases and the existence of a producing well on one lease will not place the other in the status of a producing lease.

Champlin Oil and Refining Company, Joe N. Champlin, A-27669 (Feb. 3, 1959) 66 I. D. 26

Section 30(a) of the Mineral Leasing Act, as amended, provides for separate leases only in those instances where partial assignments of oil and gas leases are made and for the extension of those separate, or segregated, leases only when the conditions outlined in the section are met.

Nothing in section 30(a) of the Mineral Leasing Act, as amended, operates to extend oil and gas leases assigned in their entirety; consequently an assignment of a lease in its entirety, which is filed during the last month of the 5-year extended term of a lease, is properly refused approval since the assignment could become effective only on the first day of the month following expiration of the lease.

E. C. Donohue and Wilma Donohue Moleen, A-27881 (Apr. 21, 1959)

OIL AND GAS LEASES--Continued

ASSIGNMENTS OR TRANSFERS--Continued

The limitation upon the Secretary's authority to refuse to approve an assignment of all or part of an oil and gas lease contained in section 30(a) of the act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 187(a)), as amended, is as regards assignments of fractional interest leases for acquired lands, subject to the provisions of section 5 of the act of August 7, 1947 (61 Stat. 913; 30 U.S.C. sec. 354), which results in the imposition of a qualification upon lessees of fractional interests additional to those prescribed in the act of February 25, 1920. However, the right given to one who makes an offer to lease such a fractional interest to show his qualifications is equally available to an assignee, whose assignment covers less than a majority interest in the whole deposit.

Assignment of Federally Owned Fractional Interest in Oil and Gas Lease by Lessee Who Also Owns but Does Not Assign the Privately Owned Remaining Fraction, M-36570 (Aug. 10, 1959)

An assignment of an oil and gas lease which has been automatically terminated for failure to pay the rental due on the anniversary date cannot be approved.

Florence Lyman Taub, A-28040 (Aug. 19, 1959)

The Department's supplemental decision in Franco Western Oil Company, 65 I. D. 427 (September 30, 1958), is adhered to.

Duncan Miller, A-28093, A-28151, A-28191, A-28195, A-28196, A-28203, A-28221, A-28222, A-28225, A-28239 (Oct. 30, 1959)

M. Blaine Peterson, A-28111 (Nov. 23, 1959)

Duncan Miller, A-28133 (Dec. 22, 1959)

Where an assignment of an oil and gas lease in its entirety and a partial assignment of the lease by the assignee under the first assignment are filed during the last month of the extended 5-year term of the lease, it is error to approve the assignments and to hold that the segregated leases are extended for a period of 2 years as the result of the partial assignment, and the extensions should be canceled.

Nothing in section 30(a) of the Mineral Leasing Act, as amended, operates to extend oil and gas leases assigned in their entirety; consequently, where an assignment of a lease in its entirety, filed during the last month of the 5-year extended term of a lease, is approved, the action is erroneous since the assignment could become effective only on the first day of the month following expiration of the lease.

OIL AND GAS LEASES--Continued

ASSIGNMENTS OR TRANSFERS--Continued

Section 30(a) of the Mineral Leasing Act, as amended, provides for separate leases only in those instances where partial assignments of oil and gas leases are made and for the extension of those separate, or segregated, leases only when the conditions outlined in the section are met.

Duncan Miller et al., A-28120 (Nov. 9, 1959) 66 I. D. 380

The Department's supplemental decision of September 30, 1958, in Franco Western Oil Company et al., 65 I. D. 427, will not be modified to afford recognition to partial assignments of oil and gas leases filed during the month of September 1958, or thereafter, at a time when the leases were in the 12th month of the 10th year of the extended terms of such leases.

Mike Abraham, A-28163 (Nov. 16, 1959)

The departmental ruling that the retained portion of a segregated lease covering undeveloped land, created by assignment while the base lease is in its extended term, is entitled to an extension will not be disturbed.

M. Blaine Peterson, A-28111 (Nov. 23, 1959)

BONDS

Where a noncompetitive oil and gas lease is issued to an applicant for patented lands and inadvertently the lessee is not required to file a bond for the protection of the owner's surface rights, the lessee is properly required to file such a bond whenever the error is discovered.

D. Miller, A-27567 (Apr. 29, 1958)

The provision added to section 31 of the Mineral Leasing Act by the act of July 29, 1954, terminating leases automatically on failure of the lessee to pay the rental on the anniversary date, did not have the effect of abrogating the requirement in outstanding leases that a $1,000 bond must be filed not less than 90 days before the due date of the next rental payment, and a consent filed by a lessee to bring his lease under the 1954 act would not dispense with his obligation to file a bond.

D. Miller, A-27581 (June 12, 1958)

OIL AND GAS LEASES--Continued

CANCELLATION

The Secretary of the Interior (or his delegate) can revoke the extension of an oil and gas lease granted in contravention of the pertinent statute and regulation at any time he is made aware of the improper action, without regard to the merits of any other offer for the lands covered by the lease.

John J. Farrelly et al., A-27068 (Jan. 7, 1955) 62 I. D. 1

One whose oil and gas lease is erroneously canceled and who fails to appeal from the decision canceling the lease loses his rights in his lease.

C. T. Hegwer et al., A-27002 (Mar. 11, 1955) 62 I. D. 77

Where a noncompetitive oil and gas lease is committed to a unit agreement, the unit operator is not entitled to notice of default in terms of the lease prior to the cancellation of the lease.

Zion Oil Company et al., A-27152 (Sept. 20, 1955) 62 I. D. 369

A noncompetitive oil and gas lease erroneously issued in violation of a statutory preference right given to a senior applicant must be canceled; such cancellation is not governed by section 31 of the Mineral Leasing Act, as amended.

Iola Morrow, A-27177 (Oct. 10, 1955)

Where oil and gas leases have been issued on acquired lands as to which it is uncertain whether the United States has a present leasable interest because of a mineral lease granted thereon by one of the Government's predecessors in title, but where the validity of that prior lease is questionable and litigation is pending which may establish whether it is a valid, outstanding lease, the Department will not cancel the acquired lands leases pending the outcome of such litigation.

Halvor Holbeck, Mrs. E. B. McFadden, The Texas Company, A-27167, A-27182 (Nov. 14, 1955)

OIL AND GAS LEASES--Continued

CANCELLATION--Continued

Where, after an oil and gas lease has been issued on acquired lands, the agency having jurisdiction over such lands withdraws the consent to lease which was previously given and requests that the lease be revoked as to part of the lands, stating that a revocable permit has been issued which conflicts in part with the lease, and where there is no stipulation in the lease making it subject to termination on such a basis, the lease will not be canceled, all else being regular.

L. D. Dale, A-27166 (Nov. 14, 1955)

Where a lessee has been given proper notice as provided in the Mineral Leasing Act, the pertinent regulation, and the lease that his lease will be canceled unless he files a bond or dispenses with the necessity of filing a bond, by paying the next year's rental in advance, and he fails to do either, his lease may be canceled prior to the expiration of the lease year.

Where an oil and gas lease has been properly canceled, a lessee cannot avail himself of the later issuance of regulations making the automatic termination provision of the act of July 29, 1954, applicable to leases issued prior to July 29, 1954.

Noel Teuscher, A-27195 (Dec. 19, 1955) 62 I. D. 470

An acquired lands oil and gas lease is properly canceled as to a tract of land covered thereby which was not available for leasing when the application therefor was filed because the tract was included in a prior lease and the relinquishment and cancellation of the prior lease had not been noted on the acquired lands plat records when the subsequent application was filed.

B. E. Van Arsdale, A-27183 (Dec. 28, 1955) 62 I. D. 475

It is improper to cancel an oil and gas lease on the ground that prior applications for leases on the same land have not been considered.

Where an oil and gas lease is issued before final action has been taken on a prior offer to lease the lands, there must be a finding that the prior offeror is qualified to receive the lease before the lease is canceled.

Madison Oils, Inc., T. F. Hodge, A-27163 (Dec. 28, 1955) 62 I. D. 478

OIL AND GAS LEASES--Continued

CANCELLATION--Continued

When a competitive oil and gas lease has been issued for a tract of land upon the recommendation of the Geological Survey and there are no intervening interests, there is no justifiable basis for later canceling the lease because the Geological Survey later determines that the leased land was not situated within the known geologic structure of a producing oil or gas field at the time of issuance of the lease.

Max Barash, The Texas Company, A-27239 (Feb. 14, 1956) 63 I. D. 51

Where the record of an application for patent on mining claims indicates that the claims were located in 1948 on lands open to mining location and that the claims are valid, oil and gas leases issued for land included in the claims are properly canceled to the extent that they conflict with such locations where the applications for the leases were filed several years after the mining claims were located.

Marion F. Jensen et al., Elden F. Keith et al., A-27254, A-27256, A-27257 (Feb. 24, 1956) 63 I. D. 71

Where the only reason for canceling an oil and gas lease is that it was issued to a junior applicant and the senior applicant waives, loses, or surrenders his prior right, the outstanding lease will not be canceled.

Merle J. Vandepas, A-27269 (Mar. 12, 1956)

Although an oil and gas lease may be a nullity insofar as it purports to convey an interest in oil and gas deposits already under lease, it nevertheless serves to segregate the land and makes it unavailable for further leasing until such time as its revocation is noted on the records of the local land office and an oil and gas lease issued to another for the same land prior to such notation must be canceled.

R. B. Whitaker, Mrs. Jacqueline Anderson, A-27284 (May 7, 1956) 63 I. D. 124

The rental and royalty provisions in oil and gas lease Form 5-157 (November, 1947) for tribal Indian lands are construed as "obligations," as well as "terms and conditions" and the lessee who fails to surrender the lease on or before the rental anniversary date becomes contractually obligated to pay the full amount of the annual rental. Failure to pay the rent and royalties on the due dates, or a late payment of either, would not result in automatic termination

OIL AND GAS LEASES--Continued

CANCELLATION--Continued

of the lease but would subject the lease to cancellation in the discretion of the Secretary of the Interior and the Tribal Council under section 6 of the lease form.

Interpretation of Rental Provisions in Oil and Gas Lease Form 5-157 (November, 1947) for Tribal Indian Lands, M-36348 (June 6, 1956)

Where an oil and gas lessee fails to pay the fourth year's rental on his lease, he cannot complain that his lease should have been canceled prior to the due date of his rental, thus preventing its accrual, because of his failure to post a $1,000 bond 90 days prior to the due date of the rental.

Robert H. Miller, A-27322, A-27323 (July 3, 1956)

Leases on lands not known to contain valuable deposits of oil or gas are properly canceled where the lessees are notified by registered mail that either bonds must be filed or advance rental must be paid under their leases and that if the default continues after 30 days from service of notice thereof, the leases will be canceled without further notice, and where the lessees did not comply with the requirement.

L. P. Glasebrook et al., A-27332 (Aug. 7, 1956)

An offer to lease land which cannot be encompassed within a six-mile square is subject to rejection and where a lease is issued for part of the land embraced in the offer it must be canceled as to that land which is embraced in a proper offer filed prior to the issuance of the lease in order that the statutory preference right of the party first making a proper offer may be honored.

Arnold R. Gilbert, A-27303 (Sept. 10, 1956) 63 I. D. 328

Where an oil and gas lease is prematurely issued before final action has been taken on a prior offer to lease the land, there must be a finding that the prior offeror is entitled to receive a lease on the land before the lease is canceled.

Sidney A. Martin, C. C. Thomas, A-27410 (Apr. 1, 1957) 64 I. D. 81

CANCELLATION--Continued

If there is persuasive evidence to show that a prior oil and gas lease was canceled and the cancellation was noted in the official tract book by means of a line drawn through the serial number of the prior lease, the person first filing a qualified oil and gas lease offer after the notation was made is entitled to a lease of the land involved.

Where, on appeal to the Secretary, a question of fact is presented as to whether or not the cancellation of an oil and gas lease was noted in the official tract book by means of lines drawn through the serial number of the lease, the name of the lessee, and the description of the land in the lease prior to the filing of an oil and gas lease offer for the same land, and the evidence in the record is conflicting and inconclusive, the case will be remanded to the Bureau of Land Management to make a further investigation and to allow the parties an opportunity to submit additional evidence on the question of fact.

John Snyder, A-27445 (Sept. 9, 1957)
64 I. D. 353

Section 31 of the Mineral Leasing Act, as amended August 8, 1946 (60 Stat. 956; 30 U. S. C. sec. 188), provides for the cancellation of any lease issued after August 21, 1935, after 30 days' notice in advance of cancellation for failure to comply with any of the provisions of the lease. Accordingly, no oil and gas lease may be canceled under authority of that section until the notice requirement has been met.

Cancellation of Oil and Gas Leases Under Section 31 of the Act of February 25, 1920 (41 Stat. 450), as Amended by the Act of August 8, 1946 (60 Stat. 956; 30 U. S. C. sec. 188), M-36502 (Mar. 12, 1958)

Leases on lands not known to contain valuable deposits of oil or gas are properly canceled where the lessee is notified by registered mail that either a bond must be filed or advance rental paid under the lease and that if the default continues after 30 days from service of notice thereof the lease will be canceled without further notice, and the lessee did not comply with the requirement.

D. Miller, A-27563 (Apr. 29, 1958)

Where land not owned by the United States has been leased for oil and gas purposes under the terms of the Mineral Leasing Act, the lease

OIL AND GAS LEASES--Continued

CANCELLATION--Continued

must be canceled as only land owned by the United States is subject to leasing under that act.

John E. Miles, A-27577 (June 12, 1958)

A noncompetitive oil and gas lease is properly canceled prior to the anniversary date of the lease, where the lessee, after receiving proper notice that his lease will be canceled after 30 days from receipt of the notice unless he files a bond or dispenses with the necessity of filing a bond by paying the next year's rental in advance, fails to do either within the time allowed.

D. Miller, A-27581 (June 12, 1958)

Where a mining claimant contests oil and gas leases on the ground that land in the leases is covered by its mining claim and where at the hearing the mining claimant proves the validity of its claim and shows that the oil and gas leases extend over the claim, the mining claimant will prevail and the leases will be canceled to the extent of the conflict.

Union Oil Company of California v. Western Drilling and Producing Co. et al., A-27588 (July 14, 1958)

The fact that previous defaults on the part of lessees may have been waived, does not estop the cancellation of an oil and gas lease where the present default has continued for 30 days after notice.

Section 31 of the Mineral Leasing Act, authorizing cancellation of a noncompetitive oil and gas lease for failure to comply with the terms of the lease after 30 days' notice sent by registered mail to the record address of the lease owner, is fully complied with when the default notice was sent to a person representing himself as attorney for the lease owners, and where all previous notices had been addressed in care of such attorney and the lease owners had never indicated any other address to which notices and communications concerning the lease should be sent.

A noncompetitive oil and gas lease on lands not known to contain valuable deposits of oil or gas is properly canceled where the lessees are notified by registered mail that either a bond must be filed or advance rental must be paid under their lease and that if the default continues after 30 days from service of notice thereof the lease will be canceled without further notice, and where the lessees did not comply with the requirement.

S. M. Covey et al., A-27639 (Aug. 21, 1958)
65 I. D. 361

OIL AND GAS LEASES--Continued

CANCELLATION--Continued

Where the District Court directs the Secretary to issue an oil and gas lease to an offeror for land covered by an outstanding oil and gas lease, the latter must be canceled so that the Secretary can comply with the order of the Court.

Max Barash, The Texas Company, A-27239 (Supp.) (Jan. 21, 1959) 66 I. D. 11

A noncompetitive oil and gas lease covering land in excess of a 6-mile square issued without regard to the departmental regulation which so limits the area of such leases must be canceled when the violation of the regulation is disclosed and there is pending a qualified junior application for the same land.

Lynn Nelson, Uranium King Corporation, A-27795 (Jan. 21, 1959) 66 I. D. 14

A noncompetitive oil and gas lease must be canceled where the lessee did not file the first proper application for the lands involved.

Where an oil and gas lease is issued pursuant to an application for less than 640 acres which did not include adjoining lands which were available for leasing at the time the application was filed, the lease must be canceled where a subsequent application for the same land is filed at a time when the adjoining lands were not available for leasing and is pending when the lease is issued.

R. S. Prows, A-27726 (Jan. 26, 1959) 66 I. D. 19

A noncompetitive oil and gas lease must be canceled where the lessee did not file the first proper application for the land involved.

Where an oil and gas lease is issued pursuant to an application for less than 640 acres which did not include adjoining lands which were available for leasing at the time the application was filed, the lease must be canceled where a subsequent applicant for the same land properly included such adjoining lands in his application as were then available for leasing, thereby becoming the first person filing a qualified application for the land.

Bertrand O. Baetz, A-27840 (Jan. 30, 1959)

The provisions of section 31 of the Mineral Leasing Act, as amended, relating to the cancellation of leases for lands known to contain valuable deposits of oil and gas do not apply to leases terminated under the provisions of section 7 of the act of July 29, 1954.

Champlin Oil and Refining Company, Joe N. Champlin, A-27669 (Feb. 3, 1959) 66 I. D. 26

OIL AND GAS LEASES--Continued

CANCELLATION--Continued

An oil and gas lease erroneously issued in violation of the statutory preference right given to a senior applicant will be canceled if the senior applicant is qualified and entitled to receive a lease.

Eugenia Bate et al., A-27861 (Mar. 3, 1959)

The Secretary of the Interior need not return moneys paid in connection with an oil and gas lease as a condition to cancellation of the lease.

The authority of the Secretary to cancel an oil and gas lease is independent of the right of the lessee to a refund and the Secretary need not determine prior to or simultaneously with cancellation whether the lessee is entitled to a refund of moneys paid to the United States in connection with the lease.

A decision that a lease is to be canceled, standing by itself, is not a determination one way or the other that repayment of moneys paid in connection with the canceled lease is or is not to be made.

Max Barash, The Texas Company, A-27239 (Supp. II) (Mar. 18, 1959) 66 I. D. 114

An oil and gas lease which has been issued on the basis of an offer defective in that the description of the lands applied for was not tied to an approved corner of a public land survey as required by 43 CFR 71.2(a)(1) will not be canceled where there are no intervening rights of third parties.

Stephen P. Dillon, Martha M. Roderick, A-27880 (Apr. 7, 1959) 66 I. D. 148

An oil and gas lease is properly canceled where the lease was issued on land in an existing settlement claim in Alaska not subject to a mineral reservation without notifying the entryman and affording him an opportunity to show that the land was not prospectively valuable for oil and gas and the entryman has submitted an acceptable final proof prior to a determination by the Geological Survey that the land is prospectively valuable for oil and gas.

L. E. Grammer, A-27797 (May 4, 1959) 66 I. D. 201

An oil and gas lease of unsurveyed lands in Alaska is properly canceled where the lease offer was defective at the time it was filed because the metes and bounds description of the lands applied for was not tied to a permanent monument and another lease offer which properly described the land applied for was filed before the lease was issued.

OIL AND GAS LEASES--Continued

CANCELLATION --Continued

Under section 17 of the Mineral Leasing Act, as amended, a noncompetitive oil and gas lease of lands not on any known geological structure of a producing oil or gas field must be issued to the first qualified person filing a proper application for it, and an oil and gas lease issued to another offeror in violation of this statutory preference is subject to cancellation.

Albert Stevenson, Alexander S. Dunham, A-27953 (Jun. 30, 1959)

A noncompetitive lease erroneously issued to a junior applicant is properly canceled where the prior offer of a qualified applicant was improperly rejected.

Malcolm C. Petrie, A-28006 (July 31, 1959) 66 I. D. 288

An oil and gas lease is properly held for cancellation where it was issued pursuant to an application for less than 640 acres which did not include adjoining lands available for leasing at the time when the application was filed, as required by regulation, and where a subsequent, acceptable application was pending when the lease was issued.

F. W. C. Boesche, A-27997 (Aug. 5, 1959)

Where, through mistake, an oil and gas lease is issued covering, in small part, land withdrawn and reserved for the use of the Department of the Air Force without obtaining the consent of the Secretary of Defense and where, thereafter, the Secretary of Defense notifies this Department that there is no objection to the leasing of the withdrawn land for oil and gas purposes, the lease, insofar as it covers the withdrawn area, need not be canceled.

B. L. Haviside, Jr., A-28011 (Aug. 20, 1959)

Where an assignment of an oil and gas lease in its entirety and a partial assignment of the lease by the assignee under the first assignment are filed during the last month of the extended 5-year term of the lease, it is error to approve the assignments and to hold that the segregated leases are extended for a period of 2 years as the result of the partial assignment, and the extensions should be canceled.

Duncan Miller et al., A-28120 (Nov. 9, 1959) 66 I. D. 380

OIL AND GAS LEASES--Continued

CANCELLATION --Continued

An oil and gas lease must be canceled where the lessee filed his application for the lands involved at a time when the lands were included in an outstanding lease determined to be extended by production, although subsequently the determination was found to have been erroneous.

Duncan Miller, Louise Cuccia, A-28059 (Nov. 17, 1959) 66 I. D. 388

COMMUNITIZATION AGREEMENTS

Under sections 3 and 5 of the Acquired Lands Mineral Leasing Act (30 U.S.C., secs. 352 and 354), the communitization provisions of the Mineral Leasing Act of 1920 (30 U.S.C., sec. 226e) are applicable to lands in which the United States has acquired a future mineral interest; however, the authority under that section to enter into communitization agreements cannot be exercised when the future mineral interest owned by the United States has not been leased.

Compensatory Royalty Agreements Covering Lands in Which the United States Owns a Future Mineral Interest, M-36580 (Dec. 30, 1959)

COMPENSATORY ROYALTY

Under sections 3 and 5 of the Acquired Lands Mineral Leasing Act (30 U.S.C., secs. 352 and 354), the compensatory royalty provisions of the Mineral Leasing Act of 1920 (30 U.S.C., sec. 226) are applicable to lands in which the United States has acquired a future interest in mineral deposits; however, those provisions of law do not authorize the negotiation of a compensatory royalty agreement where the well is located on the Federal land being drained.

Compensatory Royalty Agreements Covering Lands in Which the United States Owns a Future Mineral Interest, M-36580 (Dec. 30, 1959)

COMPETITIVE LEASES

Where in accordance with the statute and regulation the notice of sale of a competitive oil and gas lease reserves the right to reject any and all bids, and only one bid is received for a particular parcel, that bid may properly be rejected for the reason that it is too low.

C. C. Thomas, A-27380 (Nov. 7, 1956)

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES--Continued

Under sections 3 and 5 of the Acquired Lands Mineral Leasing Act (30 U.S.C., secs. 352 and 354), the competitive leasing provisions of the Mineral Leasing Act of 1920 (30 U.S.C., sec. 226) are applicable to leases of lands in which the United States has acquired a future interest in mineral deposits; and where a well has already been drilled on such future interest lands, the successful bidder at the competitive lease sale may be required, under the terms of the sale, to compensate the owners of the well for their improvements.

Compensatory Royalty Agreements Covering Lands in Which the United States Owns a Future Mineral Interest, M-36580 (Dec. 30, 1959)

CONSENT OF AGENCY

An oil and gas lease application is properly rejected where the land applied for has been reserved by Presidential order for lighthouse purposes and is being actively used by the United States Coast Guard as a lighthouse reservation and the Coast Guard objects to approval of the application.

John C. de Armas, Jr., A-27105 (May 16, 1955)

Where, after an oil and gas lease has been issued on acquired lands, the agency having jurisdiction over such lands withdraws the consent to lease which was previously given and requests that the lease be revoked as to part of the lands, stating that a revocable permit has been issued which conflicts in part with the lease, and where there is no stipulation in the lease making it subject to termination on such a basis, the lease will not be canceled, all else being regular.

L. D. Dale, A-27166 (Nov. 14, 1955)

An oil and gas lease application is properly rejected where the land applied for has been transferred to the control and jurisdiction of the Department of the Navy and that Department objects to approval of the application.

Jack Weldon Wood, A-27240 (Dec. 23, 1955)

Lands subject to oil and gas leasing under the Mineral Leasing Act for Acquired Lands cannot be leased without the consent of the agency having jurisdiction over such lands.

D. Miller, A-27378 (Oct. 15, 1956)

OIL AND GAS LEASES--Continued

CONSENT OF AGENCY--Continued

An oil and gas lease offer is properly rejected where the land applied for is located within a military reservation and the Army objects to approval of the application.

Clark H. Boyles, A-27538 (Jan. 23, 1958)

Where an oil and gas offer for Veterans Administration lands is rejected solely on the ground that that agency has previously refused consent to lease the land pursuant to earlier applications, and it appears that because of changed methods of drilling and production the Veterans Administration may be willing to reconsider its previous position, the case will be remanded to ascertain the current position of that agency.

Tom H. Dowlen, A-27724 (Nov. 17, 1958)

Oil and gas lease offers are properly rejected where the lands applied for are being administered by the United States Forest Service and that agency objects to approval of the applications on the ground that operations will interfere with the uses for which the lands are being used.

G. R. Carroll et al., A-27783 (Dec. 19, 1958)

Oil and gas lease applications are properly rejected where the lands applied for are in a national forest administered by the Department of Agriculture and that agency objects to the issuance of leases.

Richfield Oil Company et al., A-27550, A-27601, A-27619 (Mar. 30, 1959) 66 I. D. 106

An oil and gas lease offer for acquired lands is properly rejected where the lands applied for are being administered by the Forest Service and that agency objects to approval of the application.

Merwin E. Liss, A-27888 (Apr. 13, 1959)

An applicant for a noncompetitive lease of acquired lands being administered by the Forest Service is properly required to file written consent to stipulations imposed by that agency as a condition precedent to issuance of the lease, or face rejection of his offer.

Celia R. Kammerman et al., A-27768 (July 17, 1959) 66 I. D. 255

OIL AND GAS LEASES--Continued

CONSENT OF AGENCY--Continued

An oil and gas lease application is properly rejected where the lands applied for are in a national forest administered by the Department of Agriculture and that agency objects to the issuance of the lease.

Paul B. Lorenz, A-27592 (Jul. 20, 1959)

An applicant for a noncompetitive lease of acquired lands being administered by the Forest Service is properly required to file written consent to stipulations imposed by that agency as a condition precedent to issuance of the lease, or face rejection of his offer.

Merwin E. Liss, A-27924, A-27940 (Aug. 31, 1959)

DEVELOPMENT CONTRACTS

A development contract consisting in part of an operating agreement will not be approved where the operating agreement was entered into on behalf of lease offerors by an agent for the offerors who at the time he signed the agreement was chargeable with excess acreage holdings in connection with the lease offers because of powers of control exercised by him over the lease offers.

Yakutat Development Company, Development Contract for Icy Bay--Cape Fairweather Area, Alaska, A-27067 (Apr. 10, 1956) 63 I. D. 97

DISCOVERY

A suspension of production under an oil and gas lease cannot be granted where the lease contains neither a producing well nor a well capable of production, even though such a discovery had been made on the lease as would support a determination that part of the leased land is situated on the known geological structure of a producing oil or gas field.

H. K. Riddle, A-27079 (Mar. 15, 1955) 62 I. D. 81

Where portions of the lessor's leased estate are conveyed to others a discovery by the lessee of oil or gas on any such portion will extend the entire lease.

Status of a Lease After Sale of Part of the Leased Premises to Others Than the Original Lessee, M-36269 (Mar. 24, 1955)

OIL AND GAS LEASES--Continued

DISCOVERY--Continued

The extension of segregated leases of undeveloped lands granted by section 30a of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; as amended, 30 U. S. C. sec. 187a), because of a discovery of oil or gas in commercial quantities on any other segregated portion of the original lease is not limited to assignments and discoveries made during the primary term of the lease but applies as well to those made during an extension of such term.

Authority to Extend a Segregated Lease for 2 Years From the Date of Discovery of Oil or Gas in Paying Quantities During an Extended Term on any Other Segregated Portion of the Lands Originally Subject to the Same Lease, M-36472 (Nov. 20, 1957)

DISCRETION TO LEASE

Where jurisdiction over oil and gas deposits in acquired lands have been transferred to this Department for protective leasing to offset drainage, the Department would not be justified in refraining from issuing leases merely because the former owners of the land and deposits indicate that they intend to seek legislation returning the land or deposits to them.

Albert J. DeLange et al., A-27277 (Jan. 4, 1956)

It is proper to reject offers for oil and gas leases in an area which the Secretary of the Interior, in his discretion under the Mineral Leasing Act, has determined to have no value for oil and gas.

Marie E. Tuttle et al., A-27481 (Jan. 28, 1958)

The granting of oil and gas leases on Federal lands is a matter within the discretion of the Secretary of the Interior and regulations reasonably requiring lessees to prevent waste and protect property are valid.

Validity of Regulations Relating to Oil and Gas Leases on Wildlife Refuges, Game Range and Coordination Lands, M-36519 (July 15, 1958) 65 I. D. 305

Where a group of leases has been issued which covers practically all of an unsurveyed island, it is proper to refuse to issue leases for isolated tracts which may have been omitted from the original leases, whose existence and size cannot be determined until after survey and adjustment of the boundaries of the existing leases, especially when there is no compelling public interest in issuing other leases.

Richfield Oil Corporation, A-27697 (Oct. 23, 1958)

OIL AND GAS LEASES--Continued

DISCRETION TO LEASE--Contioned

Section 6 of the act of February 28, 1958, does not give the Secretary of the Interior authority to issue oil and gas leases, with the concurrence of the Secretary of Defense, on lands in existing withdrawals which expressly prohibit mineral leasing.

B. L. Haviside, Jr., A-27932 (July 21, 1959) 66 I. D. 271

DRAINAGE

Where jurisdiction over oil and gas deposits in acquired lands have been transferred to this Department for protective leasing to offset drainage, the Department would not be justified in refraining from issuing leases merely because the former owners of the land and deposits indicate that they intend to seek legislation returning the land or deposits to them.

Where land and the mineral deposits therein have been acquired by the United States in condemnation proceedings and jurisdiction over the oil and gas deposits is transferred to this Department for taking action to protect the United States from loss because of drainage of the oil and gas by wells on adjacent private lands, a protest by the former landowners against the issuance of competitive oil and gas leases covering the deposits will be dismissed where the protest is based upon unfounded assertions that the condemnation proceedings were invalid and that the protestants have a right to the reconveyance of the property or the minerals therein.

Albert J. DeLange et al., A-27277 (Jan. 4, 1956)

DRILLING

Under section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946, a competitive lease in its extended term by reason of production terminates by operation of law when production ceases unless diligent drilling operations are being conducted on the lease at that time, in the absence of an order under section 39 suspending operations and production on the lease.

Steelco Drilling Corporation, A-27435 (May 31, 1957) 64 I. D.214

EXCHANGE LEASES

A noncompetitive oil and gas lease issued under section 17(a) of the Mineral Leasing Act, as amended, is entitled to the single extension afforded by the third paragraph of section 17 of the act, as amended.

Richfield Oil Corporation, A-27954 (Aug. 12, 1959) 66 I. D. 292

OIL AND GAS LEASES--Continued

EXTENSIONS

An application for a 5-year extension of a noncompetitive oil and gas lease must be rejected where the application was not filed within the 90-day period prior to the expiration date of the lease.

John J. Farrelly et al., A-27068 (Jan. 7, 1955) 62 I. D. 1

Floyd Childress, A-27038 (Mar. 7, 1955) 62 I. D. 73

W. P. Clements, Jr., A-27073 (Apr. 27, 1955)

Mattie B. Kinsey, Margaret Kinsey Long, A-27103 (Aug. 22, 1955) 62 I. D. 334

Where an application for a 5-year extension of an oil and gas lease is addressed to the home address of the manager of the land office and received by him after business hours on Friday, the application will not be considered filed until such time as it is received by the land office on the following Monday, the first business day in which the application can be filed.

Floyd Childress, A-27038 (Mar. 7, 1955) 62 I. D. 73

Under section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946, where there has been no production during the primary term of a lease from the leased land, part of which is, and part of which is not, within the known geological structure of a producing oil or gas field at the expiration of the primary term, such a lease is not extended as to that portion of the land not within the structure of a producing field by the prosecution of diligent drilling operations on the portion of land which is within the structure of a producing field.

In order to obtain a 5-year extension of his lease, a lessee must file an application for such extension; diligent drilling operations do not have the effect of an application.

An oil and gas lease is not extended beyond its primary term by a mere discovery on the lease without actual production of oil or gas in paying quantities at the expiration of the primary term.

H. K. Riddle, A-27079 (Mar. 15, 1955) 62 I. D. 81

EXTENSIONS--Continued

The last sentence of the fourth paragraph of section 17(b) of the Mineral Leasing Act, as amended, relating to the extension of unitized oil and gas leases upon their elimination from a unit agreement or the termination of the unit agreement applies to 20-year oil and gas leases.

H. Leslie Parker, M. N. Wheeler, A-27066 (Mar. 18, 1955)
62 I. D. 88

Where, during the primary term of a lease on land not within the known geologic structure of a producing field, the lessee becomes disqualified to hold the lease, and it terminates by operation of law, the lease is not subject to the single extension provided for by section 17 of the Mineral Leasing Act.

John E. Miles, A-27075, A-27144 (April 11, 1955) 62 I. D. 135

Where an acquired lands oil and gas lease expires on a nonbusiness day, an application for a 5-year extension filed on the first day thereafter that the Bureau of Land Management is open for business cannot be regarded as timely filed.

W. P. Clements, Jr., A-27073 (April 27, 1955)

The issuance of a patent excepting and reserving to the United States the oil and gas deposits but providing that title to the same shall vest in the patentee upon termination of an outstanding oil and gas lease, does not preclude the extension of the oil and gas lease authorized in section 17 of the Mineral Leasing Act as amended August 8, 1946 (60 Stat. 951; 30 U.S.C. sec. 226).

Whether Solicitor's Opinion M-36254 (December 28, 1954) Effects a Withdrawal From Oil and Gas Leasing of Lands Disposed of Under a Patent Which (a) Excepts Oil and Gas Deposits Previously Leased but (b) Provides that Title To Such Deposits Shall Vest in the Patentee Upon Termination of the Lease, M-36254 (Supp.) (May 10, 1955) 62 I. D. 177

A partial assignment of a lease made during the period of the single 5-year extension provided for in section 17 of the act of August 8, 1946 (60 Stat. 955), and prior to the act of July 29, 1954, is valid.

EXTENSIONS--Continued

A separate lease created by an assignment of part of the acreage in a lease pursuant to the provisions of the act of July 29, 1954 (68 Stat. 585; 30 U.S.C., Cum. Supp., 187(a)), where the lease is in its extended term by reason of any provision of the Mineral Leasing Act, as amended, is not limited to the 2-year extension prior to the production of oil and gas in paying quantities resulting from such assignment if, were it not for the assignment, the original lease would have continued longer without such production.

Partial Assignment of Oil and Gas Leases in Extended Term, M-36278 (May 31, 1955)
62 I. D. 216

The 1954 amendment to the Mineral Leasing Act with respect to the extension of leases capable of producing on which production has ceased does not apply to a lease on which production had ceased over 3 years prior to the amendment.

James Shelton, A-27116 (June 20, 1955)
62 I. D. 236

Where an application for a 5-year extension of an oil and gas lease is deposited in the mail slot of the land office on a Saturday, a nonbusiness day, the application will not be considered filed until such time as it is received by the land office on the following Monday, the first business day in which the application can be filed.

Mattie B. Kinsey, Margaret Kinsey Long, A-27103 (Aug. 22, 1955) 62 I. D. 334

A competitive oil and gas lease is not entitled to the 5-year extension provided in section 17 of the Mineral Leasing Act for noncompetitive leases.

Ben F. Swisher, A-27201 (Nov. 21, 1955)

Where the holder of a 5-year noncompetitive oil and gas lease fails to apply for an extension of the lease within 90 days prior to the expiration of the primary term of the lease, his lease cannot be reinstated and extended, particularly where another offer for the land was filed after the expiration of the primary term of the lease.

Arthur L. Rankin, A-27308 (May 4, 1956)

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

When the law provides for the segregation of an oil and gas lease and that the segregated portion "shall continue in force and effect for the term thereof but for not less than two years * * *," it means the entire term of the lease or the period that the lease had to run, whether that period was definite or indefinite, as it existed on the date of the segregation.

Extension of the Portion of a Lease Outside of and Segregated as the Result of the Creation of a Unit Plan, M-36349 (Aug. 10, 1956) 63 I. D. 246

Undeveloped oil and gas leases determined by the Secretary to be entitled to receive the benefits provided for by subsection 6(b) of the Outer Continental Shelf Lands Act may be extended under that subsection for a period equivalent to the period that their development is prevented by the Supreme Court's order of June 11, 1956, issued in the case of United States v. State of Louisiana, Original No. 15 (351 U. S. 978), or for a period equivalent to the remainder of their primary terms as extended as of June 11, 1956, whichever is shorter.

Authority to Extend the Terms of Oil and Gas Leases on the Outer Continental Shelf for a Period Equivalent to the Period During Which Development of the Leases is Prevented as the Result of Litigation Instituted by the Lessor, M-36364 (Sept. 19, 1956) 63 I. D. 337

An extension of an oil and gas lease will not be questioned upon the basis of unsupported charges that the unit agreement to which it is committed "may be illegal under the law including the anti-trust laws" and that the lessee has trespassed on another oil and gas lease.

D. Miller, Continental Oil Company, A-27366 (Sept. 27, 1956)

Where under the law then in effect, an oil and gas lease upon which production had ceased could only have been extended by the fact that "diligent drilling operations" were being conducted on the lease, "reworking" operations conducted over a year after production ceased would not have the effect of extending the lease beyond its primary term.

Morton Oil Company, A-27392 (Nov. 26, 1956) 63 I. D.392

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

An application for the extension of an oil and gas lease on lands in California filed in the land office out of which the lease issued prior to the expiration date of the initial 5-year term of the lease is timely filed, even though jurisdiction over the lands covered by the lease has been transferred to another land district in the State, in the absence of clear notice to the lessee that he must file his application in the land office for the latter district.

Donald C. Ingersoll, A-27306 (Dec. 5, 1956) 63 I. D. 397

The Outer Continental Shelf Lands Act does not contain authority for the extension of leases issued under section 8 of that act because the lessee was unable to develop his lease for any period when the lease was involved in litigation. In the absence of a law authorizing such action the term of an oil and gas lease may not be extended.

Authority to Extend the Terms of Oil and Gas Leases Issued Under Section 8 of the Outer Continental Shelf Lands Act, M-36392 (Dec. 21, 1956) 63 I. D. 406

A 5-year extension of a noncompetitive oil and gas lease is not invalid where it was based upon an application for extension filed prior to 90 days before the expiration of the primary term of the lease.

Margaret A. Andrews, Charles B. Gonsales, A-27328 (Feb. 4, 1957) 64 I. D. 9

Where Congress, over a long period of time, has consistently spelled out in detail the conditions under which it has granted the right to extensions of oil and gas leases or the limitations on that right are apparent, departure from that practice, which would result in an illogical and apparently unjustifiable grant, justifies an examination of available extraneous aids, including the legislative history of the law for the purpose of testing the language of the law against the intent of its enactment. If it is clear that the intent was different than the language implies, then such a construction will be given to it as appears justified as a result of such examination. So construed, paragraph (6) of the act of July 29, 1954, authorizes extensions for undeveloped portions of leases created by one or more partial assignments of a lease in its extended term because of any other provision

of the Mineral Leasing Act but does not authorize such extensions because of partial assignments of leases which are in their extended term pursuant to said paragraph (6).

Whether the Grant of an Extension to Assigned Undeveloped Portions of Leases in Their Extended Terms Because of Any Provision of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 181), as Amended by the Act of July 29, 1954 (68 Stat. 585), Includes an Extension of a Lease Because of an Assignment Made Within an Extended Term Pursuant to That Grant, M-36432 (May 13, 1957) 64 I. D. 127

Where production from a lease ceases because the well is no longer capable of production, the lessee is not entitled to the benefits of the provision in section 17 of the Mineral Leasing Act which provides that no lease on which there is a well capable of production shall expire because the lessee fails to produce it unless the lessee is allowed not less than 60 days after notice to place the well on a producing status.

Where the holder of a lease which is in its extended term because of production performs some reworking operations following the cessation of production but fails to continue the operations, he is not entitled to an extension of his lease.

Under the Mineral Leasing Act, as amended by the act of July 29, 1954, if production ceases on a competitive lease which is in an extended term by reason of production, the lease terminates by operation of law unless: (1) within 60 days after cessation of production, reworking or drilling operations are begun on the lease and thereafter conducted with reasonable diligence during the period of nonproduction; or (2) an order or consent of the Secretary suspending operations or production on the lease has been issued; or (3) the lease contains a well capable of producing oil or gas in paying quantities and the lessee places the well on a producing status within a reasonable time, not less than 60 days after notice to do so, and thereafter continues production unless and until the Secretary allows suspension.

Steelco Drilling Corporation, A-27435 (May 31, 1957) 64 I. D. 214

Partial assignments of undeveloped noncompetitive oil and gas leases filed and approved on the last day of the extended 5-year term are effective to extend the leases segregated thereby for the period provided in paragraph 6 of the act

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

of July 29, 1954 (68 Stat. 585), amending section 30(a) of the Mineral Leasing Act of 1920, as amended (30 U.S.C. sec. 187a). Humble Oil and Refining Company, 64 I. D. 5.

Extension of Oil and Gas Leases Under the Act of July 29, 1954 (68 Stat. 583), Amending Section 30(a) of the Mineral Leasing Act of 1920, as Amended (30 U.S.C. sec. 187a), M-36443 (June 4, 1957)

Where an oil and gas lease is extended pursuant to the last sentence in section 30a of the Mineral Leasing Act, as amended (68 Stat. 585; 30 U.S.C., 1952 ed., Supp. IV, sec. 187a), the extension runs from the next succeeding anniversary date of the lease for such part of 2 years as remain after deducting the period, if any, between the effective date of the (partial) assignment and such anniversary date and there is no change in the anniversary date.

The procedure with respect to the approval of assignments where the term of the assigned lease is extended by operation of law even after the lease term in which they were filed has expired is the same as it has always been. An assignment may be approved in such circumstances and the approval will relate back to the effective date of the assignment as fixed in section 30a of the act.

If the resulting extension is for less than a full year or if after it has run for a full year it is due to continue for less than another full year, the annual rental is to be prorated in the same proportion that the remaining fractional year of the extended term bears to a full year.

Any lease issued under any provision of the Mineral Leasing Act which is in its extended term under any provision of that act is subject to partial assignment and the resulting lease or leases of any undeveloped land is entitled to the extension provided for in the law. The extension privilege does not apply to renewals of leases pursuant to section 17 of the act, as it read prior to its amendment August 21, 1935.

Certain Questions Arising as the Result of the Extension of the Segregated Lease of Any Undeveloped Lands Resulting From a Partial Assignment of a Lease Which is in its Extended Term Because of Any Provisions of the Mineral Leasing Act Pursuant to Section 30a Thereof (30 U.S.C., 1952 ed., Supp. IV, Sec. 187a), M-36464 (Aug. 8, 1957) 64 I. D. 309

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

Where rentals remain unpaid on a lease at the expiration of its primary term, it has not been maintained in accordance with the statutory requirements and regulations and the lessee is not entitled to an extension of the lease.

Duncan Miller, B. E. Chamberlin, A-27458 (Aug. 12, 1957)

The amendment to section 31 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 181), by the act of July 29, 1954 (68 Stat. 585; 30 U.S.C., Supp. IV, sec. 188), providing for automatic termination of a lease, not containing a well capable of production, for nonpayment of the annual rental, when considered in connection with the text of the act which it amends, and its purpose is not considered to apply to a failure timely to pay the second annual rental for the extended 5-year period where notice of the extension was not mailed to the lessee in time for him to receive it and return the rental so that it would be received not later than the seventh anniversary date of the lease.

Effect of the Law Providing for the Automatic Termination of an Oil and Gas Lease on Which There is no Well Capable of Producing Oil and Gas in Paying Quantities Upon the Extension of Such a Lease Prior to Timely Notice of the Extension, M-36458 (Aug. 15, 1957)
64 I. D. 333

The holder of a noncompetitive oil and gas lease is not given by his lease a contractual right to a 5-year extension which prevails over all other extension provisions of the Mineral Leasing Act, as amended.

The owner of a noncompetitive oil and gas lease which is producing in paying quantities at the end of the primary term of the lease is not entitled to a 5-year extension as to such of the leased land as may not be situated within the known geologic structure of a producing oil or gas field at that time.

The owner of a noncompetitive oil and gas lease whose lease is committed to a unit plan is not entitled to a 5-year extension of his lease granted by section 17 of the Mineral Leasing Act where the lease is extended by the provisions of section 17(b) of the act.

Seaboard Oil Company, A-27479 (Nov. 7, 1957)
64 I. D. 405

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

An oil and gas lease which enters an extended term of 2 years for reasons other than production does not fall into the category of leases in their extended term because of production upon the obtaining of production during the 2-year extended term.

D. J. Simmons, A-27478 (Nov. 15, 1957)
64 I. D. 413

The extension of segregated leases of undeveloped lands granted by section 30a of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; as amended, 30 U. S. C. sec. 187a), because of a discovery of oil or gas in commercial quantities on any other segregated portion of the original lease is not limited to assignments and discoveries made during the primary term of the lease but applies as well to those made during an extension of such term.

Authority to Extend a Segregated Lease for 2 Years From the Date of Discovery of Oil or Gas in Paying Quantities During an Extended Term on any Other Segregated Portion of the Lands Originally Subject to the Same Lease, M-36472 (Nov. 20, 1957)

Section 1(7) of the act of July 29, 1954, is applicable only to those leases which are extended subject to the statutory condition that the extended lease is subject to the rules and regulations in force at the expiration date of the initial 5-year term of the lease. It does not apply where the extension attaches as a matter of right pursuant to an unconditional grant of Congress upon the happening of a named event. In such case, the right runs from the date of the lease, although it does not attach until the named event occurs.

Application of Section 1(7), Act of July 29, 1954 (68 Stat. 583; 30 U. S. C. sec. 188), to Oil and Gas Leases in their Extended Term Under Various Extension Provisions of the Mineral Leasing Act, M-36490 (Jan. 8, 1958)

Where an oil and gas lessee applies for an extension of his entire lease despite the fact that he had previously assigned a portion of his lease to another and the assignment has been approved, he will not be considered to be an apparent or ostensible agent for the assignee in applying for the extension where there is no evidence that the lessee has ever been held out to be an agent of the assignee.

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

Where an oil and gas lessee applies for an extension of his entire lease despite the fact that he had previously assigned a portion of his lease to another and the assignment has been approved, he will not be considered to be the agent of the assignee in applying for the extension where there is no proof that he was designated as the assignee's agent and the circumstances surrounding his applying for the extension not only fail to show that he was acting as agent but show a situation inconsistent with the concept of agency.

In order to have segregative effect so as to prevent land from being open to filing, an application for a 5-year extension of an oil and gas lease covering the land must be filed by the record titleholder of the lease, an assignee whose assignment has been filed for approval, an operator whose operating agreement has been filed for approval, or one who purports to act as agent for any of these persons.

An application for a 5-year extension of an oil and gas lease which is filed after the close of the published office hours of a land office on the last day of the lease term is not timely filed.

Earl C. Hartley et al., A-27437, A-27446, A-27447 (Jan. 13, 1958) 65 I. D. 12

Where the single 5-year extended term of a noncompetitive oil and gas lease committed to a unit agreement expires and thereafter the unit agreement is terminated, both before any production is obtained within the unitized area, the lease is not entitled to the 2-year extension authorized by the second proviso to section 5 of the act of August 8, 1946 (60 Stat. 952; 30 U. S. C. sec. 226(e)), having expired at the end of its 5-year extended term.

Extension of Oil and Gas Lease on Termination of Unit Plan Under Provisions in 30 U. S. C. Sec. 226(e)--Oil and Gas Lease Evanston 022930, M-36499 (Feb. 6, 1958) (Memorandum from Regional Solicitor, Denver, Colorado, to State Supervisor, Bureau of Land Management, Cheyenne, Wyoming, Dec. 17, 1957.)

Where a noncompetitive oil and gas lease is extended under section 17(b) of the Mineral Leasing Act beyond the end of its 5-year term by virtue of the termination of a unit agreement to which it has been committed, and the sixth year's rental accrues on the anniversary date of the lease, the rental becomes a debt owed the United States which may not be waived.

Naomi P. Urie et al., A-27554 (Mar. 28, 1958)

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

The provision in the fourth paragraph of section 17(b) of the Mineral Leasing Act added by the act of August 8, 1946 (60 Stat. 952), as amended by the act of July 29, 1954 (68 Stat. 585; 30 U.S.C., Supp. IV, sec. 226(e)), for the extension of the segregated unitized portion of a lease where another portion of the same lease is unitized applies only to that portion of the lease situated outside of the unit area as that area is defined in 30 CFR Part 226. 2(e). It does not authorize the extension of an ununitized portion of a lease situated within the unit area, defined as above.

Whether a Lease Entirely Within a Unitized Area Only Committed as to Part of the Acreage may be Segregated into Two Leases Under Authority of Section 4 of the Act of July 29, 1954 (68 Stat. 585), M-36518 (July 29, 1958)

For leases to become segregated through assignment, and thus entitled to the extension authorized for segregated leases, an assignment must be filed when there is at least one lease month remaining in the term of the lease. A partial assignment filed during the last month of the lease term cannot become effective to segregate the lease and to entitle the segregated portions to any extension. Humble Oil & Refining Company, 64 I. D. 5 (1957), distinguished. Associate Solicitor's opinion (M-36443) (June 4, 1957), overruled in part.

Franco Western Oil Company et al., A-27607 (Aug. 11, 1958) 65 I. D. 316

Where the holder of a 5-year noncompetitive oil and gas lease fails to apply for an extension of the lease within 90 days prior to the expiration date of the primary term of the lease, the lease expires by operation of law.

Louis Kogan, A-27663 (Aug. 27, 1958)

Where the Department places a different interpretation on an act of Congress from that previously adopted, its decision announcing the new interpretation of the statute is to be given prospective application only and actions previously taken in extending oil and gas leases under the overruled interpretation of the statute will not be disturbed.

Franco Western Oil Company et al., A-27607 (Supp.) (Sept. 30, 1958) 65 I. D. 427

OIL AND GAS LEASES--Continued

EXTENSIONS --Continued

The assignment of part of the lands included in a lease during the single 5-year extension allowed under section 17 of the Mineral Leasing Act, as amended, segregates the assigned and the retained portions of the lease, and, although there is no production on any part of the leased lands at the time of the assignment or thereafter, both the assigned portion and the retained portion continue in full force and effect for a minimum period of 2 years, in accordance with section 30(a) of the Mineral Leasing Act, as amended by the act of July 29, 1954, even though the 2-year extension will continue the leases beyond the end of the 5-year extension of the original lease.

Richard P. De Smet et al., A-27837 (Oct. 29, 1958)

A 5-year extension of a noncompetitive oil and gas lease is not invalid even though the application for extension was filed more than 90 days before the expiration of the primary term of the lease.

Harold J. Hansen, Raymond J. Hansen, A-27705 (Nov. 12, 1958)

Commitment to a unit agreement of a portion of a lease on which there is production, during the extended five-year term of the lease, will not extend the uncommitted, non-producing portion beyond the fixed term of years or two years from the date of commitment, whichever is longer.

A lease upon which production is obtained while it is within any fixed term of years does not, by reason of that fact, become a lease for the life of production, but remains a lease for a fixed term of years until the end of that fixed term.

Extension of the Non-Unitized Portion of an Oil and Gas Lease Segregated by Unitization in Its Extended Five-Year Term but After Production Was Obtained, M-36543 (Jan. 23, 1959)

Land included in an outstanding oil and gas lease is not available for leasing to others and an application filed for such land must be rejected regardless of whether the outstanding lease was or was not properly extended.

R. M. Young, Jr., Mary R. Sivley, A-27640 (Jan. 30, 1959)

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

Where lessees timely filed applications for extension of their leases and, thereafter, before the end of the primary lease terms, relinquished the leases, as a consequence of which no right to an extension of the leases survived, the lands nonetheless remained unavailable for further leasing until after the notation of the tract books showing the final action taken on the extension applications.

Elmer F. Garrett, A-27819 (Mar. 24, 1959) 66 I. D. 92

Section 30(a) of the Mineral Leasing Act, as amended, provides for separate leases only in those instances where partial assignments of oil and gas leases are made and for the extension of those separate, or segregated, leases only when the conditions outlined in the section are met.

Nothing in section 30(a) of the Mineral Leasing Act, as amended, operates to extend oil and gas leases assigned in their entirety; consequently an assignment of a lease in its entirety, which is filed during the last month of the 5-year extended term of a lease, is properly refused approval since the assignment could become effective only on the first day of the month following expiration of the lease.

E. C. Donohue and Wilma Donohue Moleen, A-27881 (Apr. 21, 1959)

Where an informal application for an extension of a noncompetitive oil and gas lease is timely filed by a person who is shown on appeal to have acted in behalf of the record titleholder as his agent, the application for extension may be considered to have been properly filed and the lease may be extended if all other requirements are met.

D. J. Dowd, A-27956 (Jun. 26, 1959)

A noncompetitive oil and gas lease issued under section 17(a) of the Mineral Leasing Act, as amended, is entitled to the single extension afforded by the third paragraph of section 17 of the act, as amended.

Richfield Oil Corporation, A-27954 (Aug. 12, 1959) 66 I. D. 292

An assignee not of record in the land office who offers to pay the rent for the sixth year of a 5-year noncompetitive oil and gas lease is properly not considered as an agent of the record titleholder for the purpose of requesting extension of the lease in view of the complete absence of any evidence to show agency and assertions by the assignee and the record titleholder

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

in their subsequent communications with the land office which are incompatible with an agency relationship.

If the record titleholder of a 5-year noncompetitive oil and gas lease fails to apply for an extension of the lease within 90 days before the expiration of the lease term, the lease expires by operation of law and cannot be extended in response to a subsequent request.

Ben Sapir et al., A-28042 (Oct. 26, 1959)

The Department's supplemental decision in Franco Western Oil Company, 65 I. D. 427 (September 30, 1958), is adhered to.

Duncan Miller, A-28093, A-28151, A-28191, A-28195, A-28196, A-28203, A-28221, A-28222, A-28225, A-28239 (Oct. 30, 1959)

M. Blaine Peterson, A-28111 (Nov. 23, 1959)

Duncan Miller, A-28133 (Dec. 22, 1959)

Land included in an outstanding oil and gas lease which has been extended by the manager is not available for leasing to others and an application filed for such land must be rejected regardless of whether the outstanding lease was or was not properly extended.

Where an assignment of an oil and gas lease in its entirety and a partial assignment of the lease by the assignee under the first assignment are filed during the last month of the extended 5-year term of the lease, it is error to approve the assignments and to hold that the segregated leases are extended for a period of 2 years as the result of the partial assignment, and the extensions should be canceled.

Nothing in section 30(a) of the Mineral Leasing Act, as amended, operates to extend oil and gas leases assigned in their entirety; consequently, where an assignment of a lease in its entirety, filed during the last month of the 5-year extended term of a lease, is approved, the action is erroneous since the assignment could become effective only on the first day of the month following expiration of the lease.

Section 30(a) of the Mineral Leasing Act, as amended, provides for separate leases only in those instances where partial assignments

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

of oil and gas leases are made and for the extension of those separate, or segregated, leases only when the conditions outlined in the section are met.

Duncan Miller et al., A-28120 (Nov. 9, 1959) 66 I. D. 380

An application for extension of a 5-year noncompetitive oil and gas lease is properly rejected where the required filing fee is not paid prior to the expiration of the primary term of the lease.

Duncan Miller, A-28076 (Nov. 16, 1959)

The Department's supplemental decision of September 30, 1958, in Franco Western Oil Company et al., 65 I. D. 427, will not be modified to afford recognition to partial assignments of oil and gas leases filed during the month of September 1958, or thereafter, at a time when the leases were in the 12th month of the 10th year of the extended terms of such leases.

Mike Abraham, A-28163 (Nov. 16, 1959)

Where the Geological Survey reports to the manager that a lease is extended by reason of production and the manager so notes the serial register page, the lands covered by the lease are not available for further leasing until the termination of the lease is noted in the tract books, even though in fact production on the lease had ceased prior to the termination of the primary term of the lease.

Offers to lease for oil and gas for lands covered by an oil and gas lease in its extended term must be rejected, whether the extension is valid or not, because such lands are not open to filing until the cancellation or termination of the lease has been noted on the tract book.

Duncan Miller, Louise Cuccia, A-28059 (Nov. 17, 1959) 66 I. D. 388

Land included in an outstanding oil and gas lease which has been extended by the manager is not available for leasing to others and an application filed for such land must be rejected regardless of whether the outstanding lease was or was not properly extended.

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

The departmental ruling that the retained portion of a segregated lease covering undeveloped land, created by assignment while the base lease is in its extended term, is entitled to an extension will not be disturbed.

M. Blaine Peterson, A-28111 (Nov. 23, 1959)

FIRST QUALIFIED APPLICANT

If the Department determines that a tract of acquired land which is not within any known geological structure of a producing oil or gas field will be made available for oil and gas leasing, the Department is under a mandatory duty, imposed by statute, to lease the land to the qualified person who first submits a proper application for it.

W. M. Vaughey, George W. May, A-27389 (Oct. 31, 1956)

If the Department determines that a tract of acquired land which is not within any known geological structure of a producing oil or gas field will be made available for oil and gas leasing, the Department is under a mandatory duty, imposed by statute, to lease the land to the qualified person who first submits a proper application for it.

Stanley C. Woods, A-27382 (Nov. 6, 1956)

The provision of section 17 of the Mineral Leasing Act, as amended, giving priority to the first qualified applicant coupled with the definition of simultaneous filings contained in the regulations and with the long-continued practice of the Department requires that an oil and gas lease offer received over the counter 1 second prior to a succeeding offer for the same land be recognized as prior to such succeeding offer, opportunity having been given both parties to file under a rule that would have made the filing of both offers simultaneous at least in the absence of any equitable reason for treating both as simultaneous.

Oil and Gas Leases--Simultaneous Filings, M-36435 (May 9, 1957) 64 I. D. 124

OIL AND GAS LEASES--Continued

FIRST QUALIFIED APPLICANT--Continued

Lease offers filed immediately after the opening of a land office by offerors who submit their offers in turn without devoting time or attention to other matters are regarded as simultaneously filed even though several minutes may separate the stamping of the first and last offers, but offers filed after the offerors have attended to other business in the land office are given priority on the basis of their actual filing even though the difference in time between the actual reception by the clerk and that of prior filings may be measured in seconds and the offers bear the same time stamp.

Where there is no substantial evidence that an oil and gas offeror acquiesced without protest in a drawing to determine priority of filing of oil and gas offers, including his own, the Department will not hold that he has lost his statutory preference right to a lease earned by reason of his having been the first applicant for the lease.

Edith M. Kasper, Blanche V. White, A-27821 (Feb. 4, 1959)

An oil and gas lease offer submitted over the counter after the offeror has attended to other business in the land office is given priority on the basis of the actual filing time even though the difference between the actual reception by the clerk and that of an earlier filing may be measured in seconds.

George E. Conley, A-27901 (Apr. 20, 1959)

Lease offers filed immediately after the opening of a land office by offerors who submit their offers in turn without devoting time or attention to other matters are regarded as simultaneously filed even though several minutes may separate the stamping of the first and the last offers, but offers filed after the offerors have attended to other business in the land office are given priority on the basis of their actual filing.

George R. Wickham, Raymond J. Hansen, A-27892 (Apr. 21, 1959)

Under section 17 of the Mineral Leasing Act, as amended, a noncompetitive oil and gas lease of lands not on any known geological structure of a producing oil or gas field must be issued to the first qualified person filing a proper application for it, and an oil and gas lease issued to another offeror in violation of this statutory preference is subject to cancellation.

Albert Stevenson, Alexander S. Dunham, A-27953 (Jun. 30, 1959)

OIL AND GAS LEASES--Continued

FIRST QUALIFIED APPLICANT--Continued

A noncompetitive lease erroneously issued to a junior applicant is properly canceled where the prior offer of a qualified applicant was improperly rejected.

Malcolm C. Petrie, A-28006 (July 31, 1959) 66 I. D. 288

FUTURE AND FRACTIONAL INTEREST LEASES

An application for a noncompetitive future interest oil and gas lease is properly rejected where the Geological Survey reports that the land applied for was within the known geologic structure of a producing oil or gas field on the date the application was filed.

Stanolind Oil and Gas Company, A-27326 (July 12, 1956)

After issuance of an oil and gas lease of acquired lands in which the United States owns the entire mineral interest, the applicant's statement, offered in an appeal relating to the same application in response to which the lease was issued, that his examination of the title records indicates that certain of the lands excluded from the lease because the United States owns only a 50 percent interest in the minerals are wholly owned by the United States requires remanding for a determination whether additional lands may be available for inclusion in the lease.

An application for an oil and gas lease of acquired lands in which the United States owns a 50 percent interest in the minerals should not be rejected as not being shown to be in the public interest where the regulation governing applications for fractional interest leases does not require but requests an applicant to submit data upon the basis of which a determination as to public interest can be made and the applicant has not been called upon to submit the showing.

Henry S. Morgan, A-27621 (Sept. 17, 1958)

An acquired lands lease offer for lands in which the United States owns only a fractional interest in the minerals must be rejected if it is not accompanied by a statement as to ownership of operating rights in the interest not owned by the United States.

Celia R. Kammerman et al., A-27768 (July 17, 1959) 66 I. D. 255

OIL AND GAS LEASES--Continued

FUTURE AND FRACTIONAL INTEREST LEASES --Continued

The limitation upon the Secretary's authority to refuse to approve an assignment of all or part of an oil and gas lease contained in section 30(a) of the act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 187(a)), as amended, is as regards assignments of fractional interest leases for acquired lands, subject to the provisions of section 5 of the act of August 7, 1947 (61 Stat. 913; 30 U.S.C. sec. 354), which results in the imposition of a qualification upon lessees of fractional interests additional to those prescribed in the act of February 25, 1920. However, the right given to one who makes an offer to lease such a fractional interest to show his qualifications is equally available to an assignee, whose assignment covers less than a majority interest in the whole deposit.

Assignment of Federally Owned Fractional Interest in Oil and Gas Lease by Lessee Who Also Owns but Does Not Assign the Privately Owned Remaining Fraction, M-36570 (Aug. 10, 1959)

An acquired lands oil and gas lease offer for lands in which the United States owns only a fractional mineral interest does not earn the offeror priority until a statement as to ownership of operating rights in the mineral interest not owned by the United States is filed.

Merwin E. Liss, A-28038 (Oct. 30, 1959)

Under sections 3 and 5 of the Acquired Lands Mineral Leasing Act (30 U.S.C., secs. 352 and 354), the compensatory royalty provisions of the Mineral Leasing Act of 1920 (30 U.S.C., sec. 226) are applicable to lands in which the United States has acquired a future interest in mineral deposits; however, those provisions of law do not authorize the negotiation of a compensatory royalty agreement where the well is located on the Federal land being drained.

Under sections 3 and 5 of the Acquired Lands Mineral Leasing Act (30 U.S.C., secs. 352 and 354), the competitive leasing provisions of the Mineral Leasing Act of 1920 (30 U.S.C., sec. 226) are applicable to leases of lands in which the United States has acquired a future interest in mineral deposits; and where a well has already been drilled on such future interest lands, the successful bidder at the competitive lease sale may be required, under the terms of the sale, to compensate the owners of the well for their improvements.

Compensatory Royalty Agreements Covering Lands in Which the United States Owns a Future Mineral Interest, M-36580 (Dec. 30, 1959)

OIL AND GAS LEASES--Continued

KNOWN GEOLOGICAL STRUCTURE

If the producing character of the geological structure underlying a tract of land is actually known prior to the date of the Department's official pronouncement on that subject, it is the date of the ascertainment of the fact and not the date of pronouncement that is determinative of rights which depend on whether the land is or is not situated within the known geological structure of a producing oil or gas field.

When the Director of the Geological Survey recommends certain acquired lands of the United States for leasing in accordance with the competitive leasing provisions of the Mineral Leasing Act, he has, in effect, defined them as being within the known geologic structure of a producing oil and gas field.

A definition of the known geological structure of a producing oil or gas field is, in effect, a withdrawal of the lands included within the bounds of the structure from noncompetitive leasing.

When a competitive oil and gas lease has been issued for a tract of land upon the recommendation of the Geological Survey and there are no intervening interests, there is no justifiable basis for later canceling the lease because the Geological Survey later determines that the leased land was not situated within the known geologic structure of a producing oil or gas field at the time of issuance of the lease.

Max Barash, The Texas Company, A-27239 (Feb. 14, 1956) 63 I. D. 51

The Geological Survey's definition of a producing oil and gas structure will not be disturbed in the absence of a clear and definite showing that the definition was improperly made.

Stanolind Oil and Gas Company, A-27326 (July 12, 1956)

The Geological Survey's definition of a producing oil and gas structure will not be disturbed in the absence of a clear and definite showing that the definition was improperly made.

Duncan Miller, A-27644 (Sept. 22, 1958)

The Geological Survey's definition of the known geologic structure of a producing oil or gas field will not be disturbed in the absence of a clear and definite showing that the definition was improperly made.

Duncan Miller, A-27737 (Nov. 20, 1958)

OIL AND GAS LEASES--Continued

KNOWN GEOLOGICAL STRUCTURE--Continued

The known geological structure of a producing oil and gas field is the trap, whether structural or stratigraphic, in which an accumulation of oil and gas has taken place and the limits of the structure are the known or inferred limits of the trap.

Karl Bruesselbach, A-28061 (Oct. 26, 1959)

The Geological Survey's definition of the known geologic structure of a producing oil or gas field will not be disturbed in absence of a clear and definite showing that it was improperly made.

A noncompetitive oil and gas lease offer for lands within the limits of the known geological structure of a producing oil and gas field must be rejected.

Duncan Miller, Louise Cuccia, A-28059 (Nov. 17, 1959) 66 I. D. 388

LANDS SUBJECT TO

Applications for noncompetitive oil and gas leases on a narrow strip of land along the United States-Canadian border which has been reserved to aid in the better enforcement of the customs and immigration laws are properly rejected where the proposed use of the land would not be compatible with the purpose for which the reservation was created and the land is not well adapted to exploration or exploitation on a sound basis.

Earl J. Boehme et al., A-26811 (Jan. 27, 1955) 62 I. D. 9

An application for a noncompetitive oil and gas lease on a narrow strip of land in the International Boundary Reservation along the United States-Canadian border is properly rejected for the reasons stated in Earl J. Boehme et al., A-26811, decided today (62 I. D. 9).

Melvin A. Muri, E. K. Cheadle, A-27007 (Jan. 27, 1955)

R. S. Miese, A-27009 (Jan. 27, 1955)

R. S. Miesse, A-27173 (Nov. 17, 1955)

Where an application for an oil and gas lease on acquired lands is rejected as to part of the land on the basis that such land is privately owned and, on appeal, the applicant submits evidence that one tract applied for is owned by

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

the United States, the case will be remanded for consideration of the evidence that the tract is available for leasing.

Henry S. Morgan, A-26997 (Mar. 4, 1955)
62 I. D. 68

An application for an oil and gas lease on certain acquired lands outside the Olympic National Park, which has been administered by the National Park Service, is properly rejected where it is proposed to exchange the lands, if determined to be surplus to the needs of Federal agencies, for privately owned lands in the national park system.

Alexander Grinstein, A-27037 (Mar. 7, 1955)

When an oil and gas lease is canceled and that cancellation is noted on the tract books of the land office, the lands formerly embraced in the lease immediately become available for leasing by others unless they are on a known geologic structure of a producing oil or gas field or are withdrawn from further leasing.

C. T. Hegwer et al., A-27002 (Mar. 11, 1955)
62 I. D. 77

Applications for oil and gas leases filed after the revocation of a withdrawal of the land covered by the applications but before the date specified in the revocation order for the receipt of applications for the land must be rejected.

Mary E. Brown, A-27072 (Mar. 23, 1955)
62 I. D. 107

An acquired lands oil and gas lease application is properly rejected where the land applied for has been declared to be surplus under the Surplus Property Act of 1944 and the mineral rights are being administered by the General Services Administration.

William O. Segerstrom, A-27076 (Mar. 31, 1955)

Where an applicant to lease acquired land for oil and gas alleges on appeal to the Secretary that according to county land records the land applied for appears to be owned by the United States and therefore may, contrary to the decision of the Bureau of Land Management, be available for oil and gas lease, and where the record shows that the Forest Service, United States Department of Agriculture, has apparently approved the use for that purpose of all the land for which the applicant has applied, thereby presumptively acknowledging that the land has been acquired and is being administered under the Bankhead-Jones Farm Tenant Act, and where an informal land-status report made subsequently to the appeal simply adverts to the fact that the

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

lands in question have long been patented, the case will be remanded to the Bureau of Land Management to determine whether the land is acquired land.

William E. Block, Jr., A-27080 (April 6, 1955)

Where the issuance of an oil and gas lease for acquired lands would be inconsistent with a program of the National Park Service to exchange such lands for lands within a national park, the issuance of the lease is not in the public interest and the application is properly rejected.

Deville H. Bundy, John W. McKnab, Halvor F. Holbeck, A-27092, A-27094, A-27095 (April 15, 1955)

Executive Order No. 5214 which withdrew lands in Alaska for the exclusive use and benefit of the Navy Department for naval purposes is properly interpreted as not by itself prohibiting the leasing of the withdrawn lands under the Mineral Leasing Act.

In general, unless the Mineral Leasing Act or a withdrawal or reservation specifically provides otherwise, lands withdrawn or reserved for a specific purpose are available for leasing under the Mineral Leasing Act, if the issuance of a lease will not be inconsistent with or materially interfere with the purposes for which the land is withdrawn or reserved.

Noel Teuscher et al., A-27099, A-27104, A-27192 (May 31, 1955) 62 I. D. 210

Where oil and gas deposits reserved to the United States under stockraising homestead entries or patents were undisposed of on March 1, 1933, when the lands containing such deposits were permanently withdrawn from all forms of entry or disposal, those deposits are not subject to leasing under the terms of the Mineral Leasing Act.

Devearl W. Dimond, A-27131 (July 5, 1955)
62 I. D. 260

Where a noncompetitive oil and gas lease is canceled and the cancellation noted on the tract books of the land office, the lands formerly embraced in the lease immediately become avail-

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

able for leasing by others unless they are on a known geologic structure of a producing oil or gas field or are withdrawn from further leasing.

Zion Oil Company et al., A-27152 (Sept. 20, 1955) 62 I. D. 369

Where the extent of the mineral interest which the United States owns in acquired lands is in dispute, the Bureau of Land Management having issued leases purporting to cover the entire mineral interest in the lands and the Government's grantor claiming to own 50% of the minerals in the lands, that part of a decision declaring that the United States owns the entire mineral interest in the land will be set aside where the Government's grantor was not made a party to such decision and was not served with a copy of the decision allowing him a right of appeal therefrom and where a proper determination of the matter is necessary for the administration of the lands.

Halvor Holbeck, Mrs. E. B. McFadden, The Texas Company, A-27167, A-27182 (Nov. 14, 1955)

Where applications for oil and gas leases on acquired lands in a wildlife refuge are required to be rejected because of a departmental regulation forbidding the issuance of such leases unless the lands applied for are subject to a unit or cooperative plan, and the regulation is amended to eliminate this requirement and to establish different conditions for the issuance of such leases, the case will be remanded to the Bureau of Land Management for further consideration of the applications in light of the amended regulation.

Elgin A. McKenna, A-26817 (Dec. 5, 1955)

An application for a noncompetitive oil and gas lease on lands which have been withdrawn for Indian use in the aid of proposed legislation and on other lands which are held in trust for certain Indian tribes, bands, or groups is properly rejected.

D. Miller, A-27227 (Dec. 12, 1955)

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

An application for a noncompetitive lease for lands which are within the known geologic structure of a producing oil and gas field at the time the application is filed must be rejected because such lands are withdrawn from noncompetitive leasing.

Max Barash, The Texas Company, A-27239 (Feb. 14, 1956) 63 I. D. 51

Where the record of an application for patent on mining claims indicates that the claims were located in 1948 on lands open to mining location and that the claims are valid, oil and gas leases issued for land included in the claims are properly canceled to the extent that they conflict with such locations where the applications for the leases were filed several years after the mining claims were located.

Marion F. Jensen et al., Elden F. Keith et al., A-27254, A-27256, A-27257 (Feb. 24, 1956) 63 I. D. 71

This Department is without authority to issue an oil and gas lease covering land already leased for oil and gas purposes under the Mineral Leasing Act.

Although an oil and gas lease may be a nullity insofar as it purports to convey an interest in oil and gas deposits already under lease, it nevertheless serves to segregate the land and makes it unavailable for further leasing until such time as its revocation is noted on the records of the local land office and an oil and gas lease issued to another for the same land prior to such notation must be canceled.

R. B. Whitaker, Mrs. Jacqueline Anderson, A-27284 (May 7, 1956) 63 I. D. 124

Lands included within an outstanding oil and gas lease, whether such lease is void, voidable, or valid, are not available for leasing and applications filed for such lands must be rejected.

Joyce A. Cabot, Allen B. Cabot, Walter G. Davis et al., A-27270 (May 7, 1956) 63 I. D. 122

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

A noncompetitive offer to lease for oil or gas lands included within unpatented entries not impressed with an oil or gas reservation is properly rejected where the land is found to be not prospectively valuable for oil or gas.

Irma Gregg, A-27344 (Aug. 9, 1956)

Lands included within an outstanding oil and gas lease, whether such lease is void, voidable, or valid, are not available for leasing to others and applications filed for such lands must be rejected.

Albert C. Massa et al., A-27158 (Supp.) (Aug. 28, 1956) 63 I. D. 279

Land included in an outstanding oil and gas lease is not available for leasing to others and an offer to lease such land must be rejected.

Arnold R. Gilbert, A-27303 (Sept. 10, 1956) 63 I. D. 328

An application filed prior to the notation on the tract book of the relinquishment of a prior lease must be rejected because the land is not available for leasing until such notation is made and the land does not become available for leasing merely because of the passage of the date on which the relinquished lease would otherwise have expired by operation of law.

Edgar C. Hornik, A-27340 (Sept. 19, 1956)

Acquired lands situated within the limits of an incorporated city are not subject to leasing under the provisions of the Mineral Leasing Act for Acquired Lands.

D. Miller, A-27378 (Oct. 15, 1956)

Where lands applied for in an oil and gas lease offer consist of portions of the former bed of the Missouri River half of which apparently was included in the Fort Peck Indian Reservation and the other half of which apparently passed to the State of Montana, the lease offer is properly rejected where, although the river has since changed its course and the original ownerships of the land may have been affected, there appears to be no theory upon which the land could again have become public land.

Mrs. Grace F. Holbeck et al., A-27361 (Oct. 31, 1956)

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

An oil and gas lease application is properly rejected where the lands applied for are included in outstanding oil and gas leases, regardless of whether the outstanding leases are void, voidable, or valid.

Mary Sue Davis, A-27381 (Oct. 31, 1956)

An application for an oil and gas lease for lands in the bed of a nonnavigable lake must be rejected where it is determined the lakebed is not public land.

Grayce R. Hiler, A-27370 (Dec. 19, 1956)

It is error to hold that land in an oil and gas lease became available for filing at the expiration of the primary term of the lease when in fact the lease was extended for another 5 years.

Where an oil and gas lease is in its extended term, no application can be filed for the leased land regardless of whether the extension of the lease was valid or invalid.

Margaret A. Andrews, Charles B. Gonsales, A-27328 (Feb. 4, 1957) 64 I. D. 9

Where lands are conveyed to the United States subject to outstanding oil and gas leases and the grantor makes no reservation, the United States becomes the owner of the lessor's interest in the unexpired leases, and the lessee becomes the lessee of the United States so that the United States can enforce covenants and agreements on the part of the lessee. The said lands are not subject to noncompetitive oil and gas leasing under the Mineral Leasing Act for Acquired Lands of August 7, 1947 (61 Stat. 913; 30 U.S.C. sec. 351 et seq.), until it has been determined that the outstanding oil and gas leases are terminated. As the lands were acquired under the provisions of Title III of the Bankhead-Jones Farm Tenant Act and the outstanding leases were due to expire automatically by their own terms in 1944, the records of the Department of Agriculture can be turned to for guidance in determining whether the outstanding oil and gas leases are terminated.

Leasability as to Noncompetitive Oil and Gas Leasing Under the Mineral Leasing Act for Acquired Lands of August 7, 1947, of Certain Lands Conveyed to the United States Under the Provisions of Title III of the Bankhead-Jones Farm Tenant Act Subject to Outstanding Oil and Gas Leases, M-36430 (Mar. 29, 1957)

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

An application for an oil and gas lease for lands which it is determined not to claim as public lands omitted from a survey must be rejected.

Ralph L. Bassett, Edwin J. Keyser, A-27372 (May 20, 1957)

It is proper to reject an oil and gas lease offer for accreted lands formed between the date of survey of the adjoining lot and the date of entry thereof where the United States patented the adjoining lot without an oil and gas reservation, the United States has filed a declaration of taking for the accreted area, and the United States has not appealed from a holding by the United States district court that title to such accretions, though substantial in amount, passed with the patent.

Edwin J. Keyser, A-27471 (May 20, 1957)

An oil and gas lease application for acquired land which is set apart for military purposes when the application is filed must be rejected as such land is not subject to leasing under the Mineral Leasing Act for Acquired Lands even though it is not being used for the purpose for which it is set apart and though the record indicates that the land may be reported to the General Services Administration as surplus.

Donald M. Snow, A-27464 (July 29, 1957)

If there is persuasive evidence to show that a prior oil and gas lease was canceled and the cancellation was noted in the official tract book by means of a line drawn through the serial number of the prior lease, the person first filing a qualified oil and gas lease offer after the notation was made is entitled to a lease of the land involved.

John Snyder, A-27445 (Sept. 9, 1957) 64 I. D. 353

Oil and gas lease offers are properly rejected where the land applied for is covered by an outstanding lease.

Raymond J. and Harold J. Hansen et al., A-27503 (Jan. 3, 1958)

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

The Mineral Leasing Act of 1920 is not applicable to lands within an Indian reservation.

Arthur F. C. Hoffman, A-27541 (Feb. 7, 1958)

Acquired lands situated within the limits of an incorporated city or set apart for naval purposes are not subject to leasing under the provisions of the Mineral Leasing Act for Acquired Lands.

Duncan Miller, A-27566 (Apr. 29, 1958)

Where the records of the Department show a tract of land to be free from an adverse claim, an oil and gas lease issued for such land is prima facie valid even though it appears thereafter that a mineral location has previously been made on the tract.

Union Oil Company of California, Ramon P. Colvert, A-27532 (May 28, 1958) 65 I. D. 245

Where title to land is in the State of New Mexico under a grant to the Territory of New Mexico later confirmed in the State, the land is not subject to leasing under the terms of the Mineral Leasing Act.

John E. Miles, A-27577 (June 12, 1958)

A regulation of the Department which provided that where a tract of land of less than 640 acres was isolated as the result of a partial relinquishment of a lease no lease offer for the relinquished land would be received for a period of 60 days from the date the partial relinquishment was filed, did not apply where the tract was isolated by virtue of the fact that it was surrounded by lands patented without a mineral reservation to the United States before the partial relinquishment was filed.

Melvin A. Brown, Blanche W. Sweeney, A-27580 (June 27, 1958)

43 CFR 192.42(d)(2), which formerly provided that where a tract of less than 640 acres was isolated as a result of the partial relinquishment of a lease, no lease offer would be received for the relinquished land for 60 days after the date of filing the partial relinquishment,

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

does not bar the inclusion of such isolated tracts in an offer covering over 640 acres which is filed prior to the end of the 60-day period.

Edward C. Donohue, A-27543 (June 27, 1958)

Lands improperly included in patents because of their known mineral character are not subject to oil and gas leases until the patents are canceled and the availability of the land for leasing is noted on the tract book.

Patricia T. Zebal et al., A-27616 (July 18, 1958) 65 I. D. 293

Lands placed in an Indian reservation are under the jurisdiction of the Bureau of Indian Affairs and not subject to leasing by the Bureau of Land Management.

An application for a noncompetitive oil and gas lease on lands which have been placed in an Indian reservation is properly rejected.

Paul T. Hoffman, A-27605 (July 24, 1958)

An acquired lands oil and gas lease application is properly rejected where the land applied for has been declared surplus under the Surplus Property Act of 1944 and the mineral rights are being administered by the General Services Administration.

Duncan Miller, Leland K. Whittier et al., A-27623 (July 28, 1958)

After issuance of an oil and gas lease of acquired lands in which the United States owns the entire mineral interest, the applicant's statement, offered in an appeal relating to the same application in response to which the lease was issued, that his examination of the title records indicates that certain of the lands excluded from the lease because the United States owns only a 50 percent interest in the minerals are wholly owned by the United States requires remanding for a determination whether additional lands may be available for inclusion in the lease.

Henry S. Morgan, A-27621 (Sept. 17, 1958)

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

Offers to lease for oil and gas lands covered by an oil and gas lease in its extended term, whether the extension is valid or invalid, must be rejected because such lands are not open to filing until the cancellation or revocation of the lease has been noted in the tract book.

Oil and gas lease offers are properly rejected where the land applied for is covered by an existing lease.

Richard P. De Smet et al., A-27837 (Oct. 29, 1958)

Where the records of the Department show that public lands have been set aside as a permanent addition to an Indian reservation, those lands are not available for oil and gas leasing under the provisions of the Mineral Leasing Act.

G. E. Kadane & Sons, A-27671 (Oct. 30, 1958) 65 I. D. 446

Tide lands in the Territory of Alaska are not subject to oil and gas leasing under the terms of the Mineral Leasing Act.

Layton A. Bennett et al., A-27659 (Nov. 3, 1958)

Where an oil and gas lease is relinquished and the relinquishment is noted on the tract book prior to the normal expiration date of the lease, the leased land becomes available for filing immediately thereafter despite another erroneous notation on the tract book that the lease terminated by operation of law at the end of its normal term.

Duncan Miller, A-27728 (Nov. 12, 1958)

Lands withdrawn by the Secretary of the Interior in aid of proposed legislation for the benefit of Indians and placed under the administrative control of the Commissioner of Indian Affairs are not available for oil and gas leasing under the Mineral Leasing Act.

Betty Ruth Wright et al., A-27519 (Nov. 14, 1958)

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

Indian trust patents or fee patents of record, even if they are invalid or void, segregate the land so as to make it not available for oil and gas leasing, and applications filed for such lands must be rejected.

Availability of Lands for Oil and Gas Leasing--Boundaries of the Fort Peck Indian Reservation, M-36539 (Nov. 19, 1958)

An oil and gas lease offer for mineral deposits within lands acquired by the United States which lands have been set apart for military or naval purposes is properly rejected under section 3 of the Mineral Leasing Act for Acquired Lands without any showing that the mineral deposits have also been so set aside.

Duncan Miller, A-27737 (Nov. 20, 1958)

When an offer for an oil and gas lease on acquired lands is rejected on the ground that the land is not subject to leasing because not owned by the United States and the offeror submits evidence that at least a portion of the land was conveyed to the United States, the case will be remanded to permit the offeror to submit conclusive evidence of ownership of the land or mineral rights by the United States at the time when the lease offer was filed and thereafter.

Lee F. Murphy, Shell Oil Company, A-27799 (Jan. 23, 1959)

So long as lands are shown upon the tract books as having been patented without a mineral reservation, noncompetitive offers to lease them for oil and gas must be rejected.

H. S. Davis et al., A-27758, A-27849, A-27858 (Jan. 30, 1959)

Oil and gas deposits in lands covered by a right-of-way acquired by a railroad under any law of the United States may be leased only to the owner or transferee of the right-of-way.

Bernie B. Bergevin, Tom Boskovich, A-27813 (Jan. 30, 1959)

Land included in an outstanding oil and gas lease is not available for leasing to others and an application filed for such land must be rejected regardless of whether the outstanding lease was or was not properly extended.

R. M. Young, Jr., Mary R. Sivley, A-27640 (Jan. 30, 1959)

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

Where an oil and gas lease offer filed for land claimed to be in a relinquished railroad right-of-way is rejected for the reason that no notation has been made in the tract book of the relinquishment, the rejection will be suspended where the offeror shows that there is a notation of a relinquishment apparently in connection with the right-of-way and the case will be remanded for a determination of the facts respecting the apparent relinquishment and the status of the land.

Frank M. Gallivan, A-27830 (Feb. 4, 1959)

Lands the title to which has been conveyed to the United States pursuant to a private exchange authorized by section 8 of the Taylor Grazing Act do not become available for offers to lease for oil and gas simply upon the acceptance of title on behalf of the United States, but only when an order is issued opening them to such disposition.

Southern California Petroleum Corporation, A-27851 (Feb. 25, 1959) 66 I. D. 61

Lands the title to which is conveyed to the United States pursuant to a private exchange authorized by section 8(b) of the Taylor Grazing Act do not become available for oil and gas leasing simply upon acceptance of title by the United States, but only when an order is issued opening the lands to such disposition.

J. E. Dawson, Jr., A-27838 (Mar. 2, 1959)

Land embraced within an outstanding lease becomes land unavailable for leasing from the date the lease is signed by an authorized officer of the United States even though the lease term does not begin until the first of the following month and an offer filed for such land after the signing of the lease must be rejected.

Stephen P. Dillon, Martha M. Roderick, A-27880 (Apr. 7, 1959) 66 I. D. 148

Lands consisting of tidelands along the Alaska coast or of beds and bottoms of navigable rivers or lakes in Alaska are not subject to leasing under the Mineral Leasing Act.

Pexco, Inc., et al., A-27868 (Apr. 7, 1959) 66 I. D. 152

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

Where the records of the Department show that lands have been set apart for the use and occupation of Indians, those lands are not available for oil and gas leasing under the provisions of the Mineral Leasing Act.

Charles B. Gonsales, A-27944 (Apr. 22, 1959)

Where an oil and gas lease offer is rejected as to a tract of land on the ground that the tract has been patented, the case will be remanded for further consideration of the offer where the records indicate that the patent does not cover such land.

Ethel Severson, A-27921 (May 21, 1959)

Land withdrawn for military purposes by means of a public land order which specifically withdraws the land from mineral leasing but permits the Secretary of the Interior to authorize surface uses and removal of materials thereon is not thereby subjected to oil and gas leasing.

Section 6 of the act of February 28, 1958, does not give the Secretary of the Interior authority to issue oil and gas leases, with the concurrence of the Secretary of Defense, on lands in existing withdrawals which expressly prohibit mineral leasing.

B. L. Haviside, Jr., A-27932 (July 21, 1959)
66 I. D. 271

The regulation which provides that a document required to be filed within a stated period, the last day of which falls on a nonbusiness day, is timely filed if it is filed on the next business day the office is open to the public, permits additional time for filing an application for extension of a noncompetitive oil and gas lease when the expiration of the primary term of the lease falls on a nonbusiness day, but during that additional time, the land formerly covered by the lease is not segregated solely because an application for extension may be filed; if an application for extension is not timely filed, the land is available for new offers on the first day following the expiration date of the primary term of the lease even though the expiration date fell on a nonbusiness day.

Malcolm C. Petrie, A-28006 (July 31, 1959)
66 I. D. 288

Where noncompetitive oil and gas leases in their 5-year extended term expire by operation of law, the lands formerly embraced in the leases immediately become available for leasing by others, and the fact that the former lessees contend that the leases were extended by operation of law on the basis of an alleged discovery of oil and gas on one of the leases does not prevent the filing of lease offers therefor.

Duncan Miller, A-27959 (Aug. 3, 1959)

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

An oil and gas lease offer for lands covered by an outstanding lease must be rejected.

Duncan Miller, A-27986 (Aug. 4, 1959)

Lands consisting of beds and bottoms of navigable rivers in Alaska are not subject to leasing under the Mineral Leasing Act.

Pexco, Inc., A-28010 (Aug. 6, 1959)

An oil and gas lease offer is properly rejected where the lands applied for are covered by existing leases.

An offer to lease lands covered by existing oil and gas leases in their extended terms, whether the extensions are valid or invalid, must be rejected because such lands are not open to filing until the cancellation or revocation of the leases has been noted in the tract book.

Duncan Miller, A-28008 (Aug. 10, 1959)

Lands included in desert land entries not impressed with a reservation of oil and gas are subject to filing of offers for oil and gas leases and where the lands are determined to be prospectively valuable for oil and gas as the result of such an offer a lease may properly be issued to the offeror and subsequent applications are properly rejected.

Joseph S. Rose, Jr., Thomas C. Moran, A-27929 (Aug. 10, 1959)

Under the automatic termination provision of section 31 of the Mineral Leasing Act, that upon failure of a lessee to pay his rental on or before the anniversary date the lease will be automatically terminated, a lessee has the whole of the anniversary date, while the land office is open for business, within which to pay the rental, and an oil and gas lease application filed on the anniversary date for land included in the prior lease is prematurely filed and must be rejected, the prior lease being in effect for the whole day.

Duncan Miller, A-28041 (Sept. 23, 1959)
66 I. D. 342

Land withdrawn for military purposes by means of a public land order which specifically withdraws the land from mineral leasing but permits the Secretary of the Interior to authorize surface uses and removal of materials thereon is not thereby subjected to oil and gas leasing.

B. L. Haviside, Jr., A-28056 (Sept. 29, 1959)

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

Land included in an outstanding oil and gas lease which has been extended by the manager is not available for leasing to others and an application filed for such land must be rejected regardless of whether the outstanding lease was or was not properly extended.

Duncan Miller et al., A-28120 (Nov. 9, 1959) 66 I. D. 380

Offers to lease for oil and gas for lands covered by an oil and gas lease in its extended term must be rejected, whether the extension is valid or not, because such lands are not open to filing until the cancellation or termination of the lease has been noted on the tract book.

A noncompetitive oil and gas lease offer for lands within the limits of the known geological structure of a producing oil and gas field must be rejected.

Where the Geological Survey reports to the manager that a lease is extended by reason of production and the manager so notes the serial register page, the lands covered by the lease are not available for further leasing until the termination of the lease is noted in the tract books, even though in fact production on the lease had ceased prior to the termination of the primary term of the lease.

Duncan Miller, Louise Cuccia, A-28059 (Nov. 17, 1959) 66 I. D. 388

Land included in an outstanding oil and gas lease which has been extended by the manager is not available for leasing to others and an application filed for such land must be rejected regardless of whether the outstanding lease was or was not properly extended.

M. Blaine Peterson, A-28111 (Nov. 23, 1959)

NONCOMPETITIVE LEASES

Where oil and gas leases were signed and completed on behalf of the United States in January 1948, they were properly dated as of the first of the following month and will not be redated after the expiration of their primary terms so as to continue them in force beyond their original expiration dates.

John E. Miles, A-27075, A-27144 (April 11, 1955) 62 I. D. 135

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

Where through error by the local land office land described in an offer for a noncompetitive oil and gas lease is inadvertently omitted from a lease and where the offeror contends that she never received the lease, the offeror will not be held to have abandoned her preferential right to a lease for the land omitted.

Melvin A. Brown, A-27169 (Nov. 29, 1955) 62 I. D. 454

Where an applicant executed lease forms which did not include part of the land for which he applied and did not protest the omission which was apparent on the face of the lease, but acquiesced for nearly 3 years in the lease as it was issued, and where, in the meantime, a lease on the tract was issued to another person, the prior applicant is deemed to have abandoned his preferential right as the first qualified applicant to lease the land omitted from his lease and his application will not be reinstated to the detriment of intervening rights.

R. J. McGrath, A-27187 (Nov. 29, 1955)

An applicant for a noncompetitive oil and gas lease who filed his offer prior to the amendment of the Mineral Leasing Act by the act of July 29, 1954, had no right to have a lease issued to him after that date subject only to the provisions of the Mineral Leasing Act as it existed prior to the amendments of that date, and the Secretary of the Interior had no authority to issue a lease after July 29, 1954, free from the amendments made on that date merely because the offer for the lease was filed prior to that date.

United Manufacturing Company et al., A-27608 (Mar. 5, 1958) 65 I. D. 106

A noncompetitive oil and gas lease issued under section 17(a) of the Mineral Leasing Act, as amended, is entitled to the single extension afforded by the third paragraph of section 17 of the act, as amended.

Richfield Oil Corporation, A-27954 (Aug. 12, 1959) 66 I. D. 292

OIL AND GAS LEASES--Continued

OPERATING AGREEMENTS

Where the lessee and the operator are in dispute as to whether their operating agreement has been terminated because of the failure of the operator to comply with its terms, the courts rather than the Department are the proper tribunal to determine the controversy.

L. N. Hagood, Standard Oil Company of California, A-27211 (Nov. 15, 1955) 62 I. D. 415

A development contract consisting in part of an operating agreement will not be approved where the operating agreement was entered into on behalf of lease offerors by an agent for the offerors who at the time he signed the agreement was chargeable with excess acreage holdings in connection with the lease offers because of powers of control exercised by him over the lease offers.

Yakutat Development Company, Development Contract for Icy Bay--Cape Fairweather Area, Alaska, A-27067 (Apr. 10, 1956) 63 I. D. 97

OVERRIDING ROYALTIES

The provisions of 43 CFR, 1953 Supp., 192.145, relating to the assignment of royalty interests did not require that such assignments of more than one percent be approved prior to the discovery of oil or gas on the lease involved.

Neil F. Stull, A-27220 (Feb. 15, 1956)

Where the average production of oil from a leasehold is 15 barrels per well per day or less, and the aggregate of the overriding royalties from production and the royalty payable to the United States exceeds that specified by departmental regulation 43 CFR 192.83, the lease is properly held to be in default if the overriding royalties are not reduced in accordance with 43 CFR 192.83.

Mrs. Dora Townsend et al., A-27661 (Oct. 6, 1958) 65 I. D. 432

OIL AND GAS LEASES--Continued

PATENTED OR ENTERED LANDS

The issuance of a patent excepting and reserving to the United States the oil and gas deposits but providing that title to the same shall vest in the patentee upon termination of an outstanding oil and gas lease, does not preclude the extension of the oil and gas lease authorized in section 17 of the Mineral Leasing Act as amended August 8, 1946 (60 Stat. 951; 30 U.S.C. sec. 226).

Whether Solicitor's Opinion M-36254 (December 28, 1954) Effects a Withdrawal From Oil and Gas Leasing of Lands Disposed of Under a Patent Which (a) Excepts Oil and Gas Deposits Previously Leased but (b) Provides that Title To Such Deposits Shall Vest in the Patentee Upon Termination of the Lease, M-36254 (Supp.) (May 10, 1955) 62 I. D. 177

Where a noncompetitive oil and gas lease is issued to an applicant for patented lands and inadvertently the lessee is not required to file a bond for the protection of the owner's surface rights, the lessee is properly required to file such a bond whenever the error is discovered.

D. Miller, A-27567 (Apr. 29, 1958)

Where an application for a noncompetitive oil and gas lease was partially rejected because part of the land applied for was included within unpatented homestead entries which were not impressed with a reservation of oil and gas to the United States and the land was determined not to be prospectively valuable for oil or gas, the application will be reconsidered where subsequent to its rejection and during the pendency of an appeal on the rejection, it is determined by the Geological Survey that the land is prospectively valuable for oil and gas.

Edward R. Coney, A-27575 (June 23, 1958)

Indian trust patents or fee patents of record, even if they are invalid or void, segregate the land so as to make it not available for oil and gas leasing, and applications filed for such lands must be rejected.

Availability of Lands for Oil and Gas Leasing--Boundaries of the Fort Peck Indian Reservation, M-36539 (Nov. 19, 1958)

OIL AND GAS LEASES--Continued

PATENTED OR ENTERED LANDS--Continued

An oil and gas lease is properly canceled where the lease was issued on land in an existing settlement claim in Alaska not subject to a mineral reservation without notifying the entryman and affording him an opportunity to show that the land was not prospectively valuable for oil and gas and the entryman has submitted an acceptable final proof prior to a determination by the Geological Survey that the land is prospectively valuable for oil and gas.

L. E. Grammer, A-27797 (May 4, 1959)
66 I. D. 201

A noncompetitive oil and gas lease application is properly rejected where the lands applied for are embraced in settlement claims in Alaska which were classified as not prospectively valuable for oil and gas prior to the filing of satisfactory final proof, and no showing is made that the lands involved were known to be mineral in character prior to the filing of final proof.

Fred Axford, A-27933 (Jun. 29, 1959)

PREFERENCE RIGHT LEASES

An application for a preference right oil and gas lease under the act of July 29, 1942, directed to land not subject to leasing at the time it was filed, is invalid and is not validated by the restoration of the land to leasing even though the restoration occurs prior to the adjudication of the application.

The act of July 29, 1942, confers upon the holder of an expiring lease only a right to be preferred over other applicants if a new lease is awarded; it gives no right against the Government to insist on a lease, if the Department of the Interior determines to withhold the land from leasing entirely.

The provision added to section 17 of the Mineral Leasing Act by the act of August 8, 1946, which states that no withdrawal from oil and gas leasing shall be effective until 90 days after notice thereof shall be mailed, registered mail, to each lessee to be affected, has no application to a lessee asserting a preference right to a new lease under the act of July 29, 1942.

Elwyn C. Hale, A-27028 (Feb. 7, 1955)
62 I. D. 19

OIL AND GAS LEASES--Continued

PREFERENCE RIGHT LEASES--Continued

Where the preference right granted to a homestead entryman for an oil and gas permit under section 20 of the Mineral Leasing Act has once been exercised and a permit issued which was later terminated, the preferential right is thereby extinguished and the entryman is not entitled to a preferential right to a noncompetitive oil and gas lease at some later date.

Robert Robinson, A-27422 (Mar. 19, 1957)

Failure of the patentees of a homestead entry to exercise their preference right to an oil and gas lease under section 20 of the Mineral Leasing Act does not extinguish the preference right in the absence of notice to the patentees of an offer to lease and the nature of the preference right afforded by the statute.

Bruce Sweeney, A-27854 (Mar. 4, 1959)

Section 6 of the act of July 3, 1958, gave a preference right to an oil and gas lease to lands beneath nontidal navigable waters only to those whose leases (or offers or applications) included public lands otherwise available for leasing adjacent to such lands.

Pexco, Inc., et al., A-27868 (Apr. 7, 1959)
66 I. D. 152

PRODUCTION

Production from a lease may properly be regarded as having ceased on the final day of the last month during which any production from the lease was reported where the exact date of cessation of production within that month is not known.

Steelco Drilling Corporation, A-27435 (May 31, 1957) 64 I. D. 214

A lease is exempted from the automatic-termination-for-failure-to-pay-rental provision only if it contains a well capable of producing oil or gas in paying quantities; such a well is one that is actually in condition to produce production which exists in paying quantities and not one that is mechanically unable to produce because the casing has not been perforated and has only prospects of being a commercial well.

United Manufacturing Company et al., A-27608 (Mar. 5, 1958) 65 I. D. 106

OIL AND GAS LEASES--Continued

REINSTATEMENT

One whose oil and gas lease is erroneously canceled and who fails to appeal from the cancellation is entitled to reinstatement of his lease only in the absence of intervening rights.

C. T. Hegwer et al., A-27002 (Mar. 11, 1955) 62 I. D. 77

An application by a unit operator for the reinstatement of a canceled noncompetitive oil and gas lease committed to the unit agreement is properly denied where the basis of the application for reinstatement is that the unit operator did not receive notice of default prior to the cancellation of the lease.

Zion Oil Company et al., A-27152 (Sept. 20, 1955) 62 I. D. 369

The reinstatement of an oil and gas lease which has been terminated amounts to a restoration of the lease to the position that it formerly occupied and in effect constitutes a rescission or wiping out of the action which caused the termination of the lease; it does not constitute the issuance of a new lease.

There is no authority in the Secretary of the Interior to reinstate an oil and gas lease which has been relinquished.

Thomas F. McKenna, Forrest H. Lindsay, A-27157 (Sept. 30, 1955) 62 I. D. 376

Where the holder of a 5-year noncompetitive oil and gas lease fails to apply for an extension of the lease within 90 days prior to the expiration of the primary term of the lease, his lease cannot be reinstated and extended, particularly where another offer for the land was filed after the expiration of the primary term of the lease.

Arthur L. Rankin, A-27308 (May 4, 1956)

An application for reinstatement of part of an oil and gas lease as to which it was erroneously canceled will be rejected where the lessee did not appeal the land office manager's action within the time allowed and at the time the application is filed the land is included within the limits of the known geologic structure of a producing oil or gas field.

Brookhaven Oil Company, A-27459 (July 29, 1957)

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

A request to vacate decisions approving partial assignments of noncompetitive oil and gas leases and returning the lands assigned to the base leases on the ground that parties did not intend the assignments to be made will be rejected where the parties did not appeal from the decisions approving the assignments within the time allowed, the assignments are regular on their face, and the parties, although informed of the filing of the assignments, made no protest against them.

D. J. Simmons, A-27478 (Nov. 15, 1957) 64 I. D. 413

RELINQUISHMENTS

One who voluntarily surrenders his oil and gas lease by filing a written relinquishment thereof, in the appropriate land office, cannot withdraw his relinquishment.

Thomas F. McKenna, Forrest H. Lindsay, A-27157 (Sept. 30, 1955) 62 I. D. 376

A lessee must file a written relinquishment of a lease in the proper land office in order to terminate the lease by relinquishment, and a telephone conversation of a lessee with the manager of the land office during which the lessee stated that he wished to terminate the lease is not an effective method of relinquishing a lease.

Charles E. Boardman, A-27327 (June 6, 1956)

An application to lease land filed prior to the notation on the appropriate tract book of the relinquishment of a prior lease on the same land must be rejected because the land is not available for further leasing until such notation is made.

M. A. Machris, Melvin A. Brown, A-27278 (June 11, 1956) 63 I. D. 161

A letter signed by assignees of an oil and gas lease relinquishing the lease will not terminate the lease or the liability of the assignors for payment of rentals thereunder where the assignment has never been approved.

Lester C. Hotchkiss, Alpha L. Hotchkiss, A-27342 (Aug. 14, 1956)

OIL AND GAS LEASES--Continued

RELINQUISHMENTS--Continued

Under an acquired lands oil and gas lease which provides that rentals shall be paid in advance for the entire year on the anniversary date of the lease, a relinquishment cannot be accepted until the rentals which have accrued prior to the filing thereof have been paid, but upon payment of the accrued rentals the relinquishment may be accepted effective as of the date upon which it was filed.

Gunvald Landheim, A-27365 (Oct. 16, 1956)

The phrase "effective as of the date of its filing" in section 30(b) of the Mineral Leasing Act, providing that a relinquishment of an oil and gas lease "shall be effective as of the date of its filing," means that a relinquishment is effective to terminate the lease from the first instant of the day upon which it is filed, and is not effective merely from the time it is filed on that day.

Where relinquishments of acquired lands oil and gas leases are filed on the first day of the fourth year of the leases, the relinquishments are effective to terminate the leases as of the first instant of the day upon which they are filed, although the time of filing was later in the day, and, therefore, rentals for the fourth lease year do not accrue.

Humble Oil & Refining Company, A-27363 (Jan. 30, 1957) 64 I. D. 5

An application for an oil and gas lease filed after a relinquishment of an existing lease has been filed but before notation of the relinquishment is made in the tract book is prematurely filed and is properly rejected.

Margaret A. Andrews, Charles B. Gonsales, A-27328 (Feb. 4, 1957) 64 I. D. 9

An application to lease land filed prior to the notation on the appropriate tract book of the relinquishment of a prior lease on the same land must be rejected because the land is not available for further leasing until such notation is made.

Edward A. Gribi, Jr., Melvin A. Brown, A-27420 (Mar. 4, 1957)

OIL AND GAS LEASES--Continued

RELINQUISHMENTS--Continued

An oil and gas application filed prior to the notation on the appropriate tract book of the relinquishment of a prior lease on the land applied for must be rejected because the land is not available for further leasing until such notation is made.

William V. Moore, A-27540 (May 13, 1958) 65 I. D. 227

The act of July 29, 1954, which provides for the automatic termination of leases upon failure of the lessee to pay the annual rental when it is due, does not permit a lessee, by submitting a partial payment of the annual rental for designated acreage in his lease, in effect to relinquish a portion of his lease and to have the portion of the lease represented by the partial payment continue in effect.

D. Miller, A-27591-A (June 23, 1958) 65 I. D. 281

A regulation of the Department which provided that where a tract of land of less than 640 acres was isolated as the result of a partial relinquishment of a lease no lease offer for the relinquished land would be received for a period of 60 days from the date the partial relinquishment was filed, did not apply where the tract was isolated by virtue of the fact that it was surrounded by lands patented without a mineral reservation to the United States before the partial relinquishment was filed.

Melvin A. Brown, Blanche W. Sweeney, A-27580 (June 27, 1958)

43 CFR 192.42(d)(2), which formerly provided that where a tract of less than 640 acres was isolated as a result of the partial relinquishment of a lease, no lease offer would be received for the relinquished land for 60 days after the date of filing the partial relinquishment, does not bar the inclusion of such isolated tracts in an offer covering over 640 acres which is filed prior to the end of the 60-day period.

Edward C. Donohue, A-27543 (June 27, 1958)

A lessee of an oil and gas lease in its final extended term who relinquishes his lease is not thereby disqualified from applying for a new lease of the same lands.

Duncan Miller, A-27620 (July 28, 1958)

OIL AND GAS LEASES--Continued

RELINQUISHMENTS--Continued

A lessee of an oil and gas lease who relinquishes his lease is not thereby disqualified from applying for a new lease of the same lands.

Duncan Miller, A-27649, A-27653, A-27665, A-27713, A-27760, A-27764 (Aug. 6, 1958)

An oil and gas lease offer which was filed in 1953 for lands included in prior leases which were relinquished is properly rejected where the offer was filed before the relinquishments were noted on the tract books even though the offer was not filed until after the date on which the relinquished leases would have expired by operation of law if they had not previously been relinquished.

The fact that relinquished leases were issued before section 30(b) was added to the Mineral Leasing Act by the act of August 8, 1946, and that the lessees under the relinquished leases may not have filed an election to have their leases governed by the 1946 act provides no basis for holding that the relinquished lands automatically became available for further filing at the expiration of the lease terms where the relinquishments had not been noted on the tract books by that time.

Eugene C. Paine, A-27632 (Aug. 21, 1958)

An oil and gas lease cannot be relinquished in part by the filing of a statement that the lessee does not intend to pay annual rental on a portion of the leased lands, and failure to pay the entire annual rental when due under a lease which is subject to section 1(7) of the act of July 29, 1954, results in the automatic termination of the whole lease.

Mary C. Hagood et al., A-27716 (Nov. 6, 1958)

Where an oil and gas lease is relinquished and the relinquishment is noted on the tract book prior to the normal expiration date of the lease, the leased land becomes available for filing immediately thereafter despite another erroneous notation on the tract book that the lease terminated by operation of law at the end of its normal term.

Duncan Miller, A-27728 (Nov. 12, 1958)

OIL AND GAS LEASES--Continued

RELINQUISHMENTS--Continued

Neither a decision by a manager cancelling an oil and gas lease for default in rental payment nor an appeal from such decision contending that the lease automatically terminated for failure to pay the rental can be considered to constitute a relinquishment of the lease.

The right to relinquish a lease is a right given solely to the lessee and it is not dependent on any action by the Secretary.

Lazare F. Bernhard, Alfred Shenberg, A-27770 (Dec. 22, 1958)

A lessee of an oil and gas lease who relinquishes his lease is not thereby disqualified from applying for a new lease of the same land.

Duncan Miller, A-27810 (Jan. 16, 1959)

Where lessees timely filed applications for extension of their leases and, thereafter, before the end of the primary lease terms, relinquished the leases, as a consequence of which no right to an extension of the leases survived, the lands nonetheless remained unavailable for further leasing until after the notation of the tract books showing the final action taken on the extension applications.

Elmer F. Garrett, A-27819 (Mar. 24, 1959)
66 I. D. 92

A lessee of an oil and gas lease who relinquishes his lease is not thereby disqualified from applying for a new lease of the same lands.

Duncan Miller, A-27897, A-27914, A-27923, A-27930, A-28003, A-28014 (Mar. 31, 1959)

A lessee of an oil and gas lease who relinquishes his lease or permits it to be canceled is not thereby disqualified from applying for a new lease of the same lands, nor is a person disqualified from filing simply because he knew a prior lease on the land was to be relinquished.

Duncan Miller, A-28114, A-28136, A-28137, A-28164, A-28192, A-28223, A-28224 (Oct. 30, 1959)

OIL AND GAS LEASES--Continued

RENTALS

Where the rental due on a noncompetitive oil and gas lease has been paid by the operator under an operating agreement approved by the Department, and no evidence has been submitted that the operating agreement has been terminated in accordance with its terms respecting termination, it is proper to refuse to accept a payment from the lessee for the same rental.

L. N. Hagood, Standard Oil Company of California, A-27211 (Nov. 15, 1955)
62 I. D. 415

The provisions of the act of July 29, 1954, automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease apply to leases issued prior to July 29, 1954, only after the lessee has filed a written notice of his consent to have his lease bound by this provision.

Noel Teuscher, A-27195 (Dec. 19, 1955)
62 I. D. 470

An application for the waiver of rentals on oil and gas leases committed to an Alaskan unit agreement conditioned upon the expenditure of a minimum sum of money for each acre included in the unitized area will not be approved where the facts fail to present such exceptional circumstances as would warrant the granting of such relief.

Jessie Briggs, Iniskin Unit Operator, Inc., A-27252 (Mar. 12, 1956)

Where a lease which is not subject to the automatic termination provision of the act of July 29, 1954, was relinquished before the beginning of the fifth lease year but long after the fourth year's advance rental became due, the lessee is properly required to pay the amount of the fourth year's rental.

Charles E. Boardman, A-27327 (June 6, 1956)

The cancellation of an oil and gas lease because of the lessee's failure to pay the fourth lease year's rental does not relieve the lessee from the obligation to pay that rental.

Robert H. Miller, A-27322, A-27323 (July 3, 1956)

OIL AND GAS LEASES--Continued

RENTALS--Continued

Where an oil and gas lease has not been surrendered before the expiration of its term, this Department has no authority to excuse or waive payment of accrued rentals under the lease.

Lester C. Hotchkiss, Alpha L. Hotchkiss, A-27342 (Aug. 14, 1956)

Where under the terms of a lease no provision is made for prorating the amount of yearly rental due should the lessee relinquish his lease after the anniversary date of the lease, but the terms of the lease provide that the rental shall be due in advance for the entire year on its anniversary date, a compromise offer of a sum which is based upon a proration of the rental on the basis of the acreage included in the lease before and after the filing of the relinquishment, must be rejected.

Gunvald Landheim, A-27365 (Oct. 16, 1956)

The provisions of the act of July 29, 1954, automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease apply to leases issued prior to July 29, 1954, only after the lessee has filed a written notice of his consent to have his lease bound by this provision.

The fact that a lease is canceled or terminated shortly after its anniversary date on which rent accrues does not relieve the lessee of his liability for the accrued rental.

Stansbury, Inc., A-27396 (Nov. 20, 1956)

Where relinquishments of acquired lands oil and gas leases are filed on the first day of the fourth year of the leases, the relinquishments are effective to terminate the leases as of the first instant of the day upon which they are filed, although the time of filing was later in the day, and, therefore, rentals for the fourth lease year do not accrue.

Humble Oil & Refining Company, A-27363 (Jan. 30, 1957) 64 I. D. 5

Neither the payment of advance rentals nor their receipt by departmental officials upon a lease which had terminated can continue or reinstate the lease.

The Superior Oil Company and The British-American Oil Producing Company, IA-697 (Mar. 8, 1957) 64 I. D. 49

OIL AND GAS LEASES--Continued

RENTALS--Continued

An offer to lease lands for oil and gas purposes accompanied by insufficient rent to cover the lands described in the offer may not be rejected as to part of the lands described in the offer in order that the rental payment submitted with the offer will be sufficient to cover the remaining lands.

Sidney A. Martin, C. C. Thomas, A-27410 (Apr. 1, 1957) 64 I. D. 81

Subsection (d)(5) of section 1 of the act of April 22, 1954 (68 Stat. 57), as amended by the act of July 11, 1956 (70 Stat. 529; 43 U.S.C., 1952 ed., Supp. IV, sec. 870), which requires that when at the time rents, royalties, and bonuses accrue, the lands or deposits covered by a single lease are owned in part by the State and in part by the United States, they shall be allocated between them in proportion to the acreage in the lease owned by each, applies only during such period as the single lease is an outstanding, valid lease embracing both State and Federal lands or deposits. When the lease terminates in any manner in its entirety, or terminates or is assigned as to all of the State land, or as to all of the Federal land, subsection (d)(5) ceases to be operative with respect to the land in the lease.

Construction of Subsection (d)(5), Act of April 22, 1954 (68 Stat. 57), as Amended July 11, 1956 (70 Stat. 529; 43 U.S.C., 1952 Ed., Supp. IV, sec. 870), M-36460 (July 30, 1957)

Where an oil and gas lease is extended pursuant to the last sentence in section 30a of the Mineral Leasing Act, as amended (68 Stat. 585; 30 U.S.C., 1952 ed., Supp. IV, sec. 187a), the extension runs from the next succeeding anniversary date of the lease for such part of 2 years as remain after deducting the period, if any, between the effective date of the (partial) assignment and such anniversary date and there is no change in the anniversary date.

If the resulting extension is for less than a full year or if after it has run for a full year it is due to continue for less than another full year, the annual rental is to be prorated in the same proportion that the remaining fractional year of the extended term bears to a full year.

The procedure with respect to the approval of assignments where the term of the assigned lease is extended by operation of law even after the lease term in which they were filed has expired is the same as it has always been. An

OIL AND GAS LEASES--Continued

RENTALS--Continued

assignment may be approved in such circumstances and the approval will relate back to the effective date of the assignment as fixed in section 30a of the act.

Any lease issued under any provision of the Mineral Leasing Act which is in its extended term under any provision of that act is subject to partial assignment and the resulting lease or leases of any undeveloped land is entitled to the extension provided for in the law. The extension privilege does not apply to renewals of leases pursuant to section 17 of the act, as it read prior to its amendment August 21, 1935.

Certain Questions Arising as the Result of the Extension of the Segregated Lease of Any Undeveloped Lands Resulting From a Partial Assignment of a Lease Which is in its Extended Term Because of Any Provisions of the Mineral Leasing Act Pursuant to Section 30a Thereof (30 U.S.C., 1952 ed., Supp. IV, Sec. 187a), M-36464 (Aug. 8, 1957) 64 I. D. 309

The provision of the act of July 29, 1954, automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease applies to a lease issued prior to July 29, 1954, only if the lessee has filed a written notice of his consent to have his lease bound by that provision.

Where an oil and gas lessee under a lease issued prior to July 29, 1954, has been notified that rental is coming due under his lease and that the automatic termination provision of the act of July 29, 1954, will not apply to his lease unless he files a written notice of his consent to have his lease bound by that provision and where the lessee fails to file such consent, the lessee is not entitled, upon his surrender of the lease 2 months after the fourth year's rental has accrued, to the benefit of the act of November 28, 1943.

Stanley Odlum and Avila Oil Company, A-27502 (Jan. 13, 1958) 65 I. D. 25

Where an offer for an oil and gas lease was filed prior to July 29, 1954, and the lease was issued after that date with a notation that it was subject to the act of that date, the lease was subject to the provision of the act of July 29, 1954, terminating leases automatically for failure to pay rental on time.

A lease is exempted from the automatic-termination-for-failure-to-pay-rental provision only if it contains a well capable of producing oil or gas in paying quantities; such a well is

OIL AND GAS LEASES--Continued

RENTALS--Continued

one that is actually in condition to produce production which exists in paying quantities and not one that is mechanically unable to produce because the casing has not been perforated and has only prospects of being a commercial well.

There is no exemption from the provision automatically terminating leases for failure to pay rental timely of leases which contain valuable deposits of oil or gas but do not have wells capable of producing in paying quantities.

The Secretary of the Interior has no authority under either section 32 or section 39 of the Mineral Leasing Act to waive or suspend retroactively rental which has already become due on an oil and gas lease so as to avoid the automatic termination of the lease because the rental was not paid when it became due.

United Manufacturing Company et al., A-27608 (Mar. 5, 1958) 65 I. D. 106

Where a noncompetitive oil and gas lease is extended under section 17(b) of the Mineral Leasing Act beyond the end of its 5-year term by virtue of the termination of a unit agreement to which it has been committed, and the sixth year's rental accrues on the anniversary date of the lease, the rental becomes a debt owed the United States which may not be waived.

Naomi P. Urie et al., A-27554 (Mar. 28, 1958)

The provision added to section 31 of the Mineral Leasing Act by the act of July 29, 1954, terminating leases automatically on failure of the lessee to pay the rental on the anniversary date, did not have the effect of abrogating the requirement in outstanding leases that a $1,000 bond must be filed not less than 90 days before the due date of the next rental payment, and a consent filed by a lessee to bring his lease under the 1954 act would not dispense with his obligation to file a bond.

D. Miller, A-27581 (June 12, 1958)

The act of July 29, 1954, which provides for the automatic termination of leases upon failure of the lessee to pay the annual rental when it is due, does not permit a lessee, by submitting a partial payment of the annual rental for designated acreage in his lease, in effect to relinquish a portion of his lease and to have the portion of the lease represented by the partial payment continue in effect.

D. Miller, A-27591-A (June 23, 1958) 65 I. D. 281

OIL AND GAS LEASES--Continued

RENTALS--Continued

The rental rates applicable to lands added to noncompetitive oil and gas leases, applications, or offers in Alaska upon the exercise of the preference right granted under the act of July 3, 1958 (72 Stat. 322), to have included therein the lands beneath nontidal navigable waters embraced therein are the same as those applicable to the other lands covered by such lease, application, or offer. Upon the addition of such lands to outstanding leases pursuant to the act all the other terms and provisions thereof, including the lease term and anniversary date, are thereafter applicable to the preference right acreage.

Rental Rates for Preference Right Oil and Gas Leases or Lease Offers Embracing Lands Beneath Nontidal Navigable Waters in Alaska Under the Provisions of the Act of July 3, 1958 (72 Stat. 322), M-36523 (Aug. 1, 1958) 65 I. D. 313

The cancellation of a lease shortly after its anniversary date on which rent accrues does not relieve the lessee of his liability for the accrued rental.

The provisions of the act of July 29, 1954, automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease apply to leases issued prior to July 29, 1954, only after the lessee has filed a written notice of his consent to have his lease bound by this provision.

Clyde B. Neill, A-27650 (Sept. 16, 1958)

Where the lessee of a noncompetitive oil and gas lease has filed written consent to have his lease bound by the provision of the act of July 29, 1954, automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease, the lease must be held to have terminated when the rental is not received by the anniversary date, notwithstanding the fact that the lessee mailed a letter to the land office containing payment for the rental within time for it to be received prior to the anniversary date, but the letter was not delivered to the land office in time apparently through no fault of the lessee.

Virginia I. Gail, A-27670 (Sept. 25, 1958)

An opinion by the Comptroller General that there is no authority for a repayment of the rentals paid on an oil and gas lease for land for

OIL AND GAS LEASES--Continued

RENTALS--Continued

which a mineral entry is later allowed and for which a patent is issued is binding upon the Secretary of the Interior.

L. N. Hagood et al., A-27657, A-27667, A-27681 (Sept. 29, 1958) 65 I. D. 405

An oil and gas lease within a unit area is subject to automatic termination for failure to pay the annual rental unless there is upon the lease either actually or constructively, a well capable of producing oil or gas in paying quantities.

Automatic Termination of Unitized Leases for Failure to Pay Rentals, M-36531 (Oct. 27, 1958)

An oil and gas lease cannot be relinquished in part by the filing of a statement that the lessee does not intend to pay annual rental on a portion of the leased lands, and failure to pay the entire annual rental when due under a lease which is subject to section 1(7) of the act of July 29, 1954, results in the automatic termination of the whole lease.

Mary C. Hagood et al., A-27716 (Nov. 6, 1958)

An oil and gas lessee is properly required to pay the accrued rentals on his leases for the lease years prior to the termination of the leases even though he was not billed for the rentals during those years.

H. F. Patterson, A-27745 (Nov. 19, 1958)

Repayment of rentals paid on an oil and gas lease will not be made where a mineral patent is issued for lands embraced by the lease for the period prior to the issuance of the patent.

Duncan Miller, Union Oil Company of California, A-27727 (Dec. 9, 1958)

Termination of an oil and gas lease subject to the act of July 29, 1954, is required for failure to pay the annual rental in advance on or before the anniversary date of the lease even though the failure to make such payment on time is occasioned by the fault of the postal employees and without fault of the lessee.

Mike Abraham, A-27763 (Dec. 22, 1958)

OIL AND GAS LEASES--Continued

RENTALS--Continued

The cancellation of a lease shortly after its anniversary date on which rent accrues for failure to pay such rent does not relieve the lessee of his liability for the accrued rent.

Lazare F. Bernhard, Alfred Shenberg, A-27770 (Dec. 22, 1958)

There is no authority in the law for crediting rentals paid against a compensatory royalty obligation.

Payment of Annual Rentals During Period For Which Compensatory Royalty is Being Paid, M-36546 (Jan. 7, 1959)

Where an oil and gas lease has been canceled, the lessee petitions for reinstatement and pays part of the rentals accruing prior to final action on the request for reinstatement, and the lease is subsequently reinstated on the ground that the cancellation was improper, the lessee is not entitled to a refund of the rentals covering the period between cancellation and reinstatement and is obligated to pay any rental accruing during that period.

Ruth B. Lucas Hugley, Executrix of the Estate of Roy O. Lucas et al., A-27809 (Feb. 2, 1959) 66 I. D. 23

The assignor of an oil and gas lease may, after the filing of an assignment but prior to its approval, elect to bring the lease under the automatic termination provision of section 7 of the act of July 29, 1954, and the lease remains thereunder whether the assignment is approved prior to or after the anniversary date of the lease. The assignee's concurrence in the election is not essential.

There is no exemption from the provision of the act of July 29, 1954, automatically terminating leases for failure to pay rental timely of leases which contain valuable deposits of oil and gas but do not have a well capable of producing in paying quantities.

The fact that rental payments are offered and accepted on a lease that has terminated cannot continue or reinstate the lease.

Champlin Oil and Refining Company, Joe N. Champlin, A-27669 (Feb. 3, 1959) 66 I. D. 26

The cancellation of a lease shortly after its anniversary date on which rent accrues does not relieve the lessee of his liability for the accrued rental.

OIL AND GAS LEASES--Continued

RENTALS--Continued

The provisions of the act of July 29, 1954, automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease apply to leases issued prior to July 29, 1954, only after the lessee has filed a written notice of his consent to have his lease bound by this provision.

Maurice L. Cowen, A-27850 (Feb. 19, 1959)

The cancellation of a lease shortly after its anniversary date on which rent accrues does not relieve the lessee of his liability for the accrued rental.

The provisions of the act of July 29, 1954, automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease apply to leases issued prior to July 29, 1954, only after the lessee has filed a written notice of his consent to have his lease bound by this provision.

Murrell Small, A-27879 (Mar. 31, 1959)

It is the responsibility of the lessee to see that any payment tendered for annual rental under an oil and gas lease is so identified that the local land office can credit the payment to the proper lease account and where payment is not so identified until after the anniversary date of a lease issued after July 29, 1954, the lease terminates by operation of law for failure to pay the rental on or before the anniversary date of the lease.

Howard Arndt, A-27895 (Apr. 20, 1959)

Where the holder of an oil and gas lease issued prior to July 29, 1954, has not filed a consent to have his lease bound by the automatic termination provision of the act of July 29, 1954, and fails to pay the rental due on the lease on or before its anniversary date, the lease is properly canceled thereafter upon the giving of the required default notice and the cancellation does not relieve the lessee of his liability for the accrued rental.

David R. Grace, A-27904 (Apr. 23, 1959)

Termination of an oil and gas lease subject to the act of July 29, 1954, is required for failure to pay the annual rental in advance on or before the anniversary date of the lease; mailing of a check in the amount of the required rental which was not received is not sufficient.

Tender of the overdue rental payment after automatic termination of a lease for failure to pay rent cannot continue or reinstate the lease.

Paradox Minerals, Inc., A-28000 (Aug. 5, 1959)

OIL AND GAS LEASES--Continued

An offer to lease public land for oil and gas purposes is converted into a lease when signed on behalf of the United States and the rental payment for the first year of the lease submitted with the lease offer is fully earned so that withdrawal of the offer and refund of the rental payment is not permissible.

Duncan Miller, A-28001 (Aug. 5, 1959)

Where the amount of rental submitted with an offer appears to be sufficient, but this cannot be positively determined because a part of the land covered by the offer is inadequately described, and the rental submitted is more than sufficient for land included in the offer which is properly described and cannot be said to be insufficient for all the land included in the offer, the offer is not subject to rejection on the ground that insufficient rental was submitted.

Duncan Miller, A-28035 (Oct. 30, 1959)
66 I. D. 370

Under the amendment of section 22 of the Mineral Leasing Act by the act of July 3, 1958, payment of the first year's rental at the rate of 50 cents per acre is properly required with respect to offers for oil and gas leases on lands in Alaska filed on or after May 3, 1958.

J. W. Bauler, Walter P. Sharpe, A-28069 (Nov. 2, 1959) 66 I. D. 377

ROYALTIES

Where different parcels of lands in a lease are separately owned the royalties on production from the discovery well are payable to the owner of the minerals in the land on which the well is situated and they are not subject to apportionment between the several owners of the leased land.

Status of a Lease After Sale of Part of the Leased Premises to Others Than the Original Lessee, M-36269 (Mar. 24, 1955)

Where a portion of the land in an oil and gas lease lies within the horizontal limits of an oil or gas deposit which was known to be productive on August 8, 1946, the lessee is not entitled under item (1) of section 12 of the act of August 8, 1946, to a flat royalty rate of 12 1/2 percent on production later obtained from

deeper zones underlying the same horizontal limits, which deeper zones were discovered by wells drilled outside the lease boundaries subsequent to August 8, 1946.

Richfield Oil Corporation, A-27083 (July 18, 1955) 62 I. D. 269

Where oil and gas leases issued under the Mineral Leasing Act do not reserve authority in the Secretary of the Interior to determine the value of the oil produced under the leases for the purpose of computing the royalties due to the United States on such production, the United States is entitled to royalties on the basis of the fair market value of the oil.

Where the fair market value of oil for royalty purposes has been determined on the same basis as that by which the price at a larger nearby field has been set and where that value results in a theoretical delivered price to the purchasing refinery no higher than other competing refiners actually pay for their crude oil delivered to their refineries, produced at other fields, the value so set will be accepted as the fair market value of the oil for royalty purposes.

Husky Oil Company et al., A-27168 (Nov. 26, 1956)

In making settlement for the gas royalty due to the United States under an oil and gas lease, a lessee may not deduct from its royalty payment the cost incurred by the lessee in transporting oil well gas to the point of delivery specified in a contract for the sale of the gas when that point of delivery is in the field where the lessee's well is located nor may the lessee deduct the cost of compressing the gas so that it may enter the buyer's line at the working pressure specified under the contract of sale.

The Texas Company, A-27427 (Apr. 1, 1957) 64 I. D. 77

The minimum royalty provisions of section 17 of the Mineral Leasing Act of 1920 (30 U. S. C. sec. 226) become effective after production in paying quantities is obtained and remain in effect so long as the lease subsists regardless of whether it is thereafter possible to continue production.

The minimum royalty payment required by section 17 of the Mineral Leasing Act of 1920 (30 U. S. C. sec. 226), once effective, is a minimum amount unconditionally payable for the

remainder of the lease term and is not subject to proration when leases are terminated prior to the end of any lease year.

Proration of Minimum Royalty on Terminated Oil and Gas Leases, M-36405 (June 13, 1957)

Subsection (d)(5) of section 1 of the act of April 22, 1954 (68 Stat. 57), as amended by the act of July 11, 1956 (70 Stat. 529; 43 U. S. C., 1952 ed., Supp. IV, sec. 870), which requires that when at the time rents, royalties, and bonuses accrue, the lands or deposits covered by a single lease are owned in part by the State and in part by the United States, they shall be allocated between them in proportion to the acreage in the lease owned by each, applies only during such period as the single lease is an outstanding, valid lease embracing both State and Federal lands or deposits. When the lease terminates in any manner in its entirety, or terminates or is assigned as to all of the State land, or as to all of the Federal land, subsection (d)(5) ceases to be operative with respect to the land in the lease.

Construction of Subsection (d)(5), Act of April 22, 1954 (68 Stat. 57), as Amended July 11, 1956 (70 Stat. 529; 43 U. S. C., 1952 Ed., Supp. IV, sec. 870), M-36460 (July 30, 1957)

The approval of a proposed unit agreement may properly be conditioned upon submission of a stipulation or other binding instrument to the effect that those Federal oil and gas leases committed to the agreement which provide for a 5 percent royalty rate shall, at the end of their respective 20-year terms or any extension thereof, become subject to the same royalty rate payable to the United States as would be applicable to renewals of such leases if the leases were not committed to the unit agreement.

Texas Pacific Coal and Oil Company et al., A-27517 (Sept. 23, 1957) 64 I. D. 363

An oil and gas lessee cannot avoid the payment of additional royalties on the ground that the claim for royalties has not been pressed for many years and is a stale claim where the claim in fact is not stale and has been pressed consistently with proceedings in the Department involving validity of the claim.

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Royalties demanded on a lease for several years in the past may be presumed to have been computed in accordance with the departmental procedure in effect at the time.

The Phebus Oil Company, A-27512 (Jan. 13, 1958)

There is no authority in the law for crediting rentals paid against a compensatory royalty obligation.

Payment of Annual Rentals During Period For Which Compensatory Royalty is Being Paid, M-36546 (Jan. 7, 1959)

In making settlement for the gas royalty due to the United States under an oil and gas lease, a lessee may not deduct from the price it receives for the gas sold in the field the cost of transporting the gas from one point in the field to the point of delivery under the sales contract nor may it deduct the cost of compressing and dehydrating the gas to meet the requirements of the sales contract.

The California Company, A-27571 (Feb. 20, 1959) 66 I. D. 54

SIX-MILE SQUARE RULE

Under the oil and gas leasing regulations in effect on September 26, 1949, the Department reserved to itself the right to reject applications for noncompetitive oil and gas leases on scattered tracts considerably more than 6 miles apart, and it was not error for the manager to reject in part an application for a noncompetitive oil and gas lease, filed on September 26, 1949, for scattered tracts which could not be included in a 9-mile square.

D. Miller, A-27011 (Feb. 28, 1955)

Where an oil and gas lease is issued by the manager of a land office covering lands which cannot be included within the six-mile square area limit fixed by the Department's regulation and the rights of third persons are not prejudiced thereby, it is proper to deny a request by the

OIL AND GAS LEASES--Continued

SIX-MILE SQUARE RULE--Continued

lessee that the lease be canceled in part as to the land outside the six-mile square and a separate lease issued to him for that land.

D. Miller, A-27338 (Aug. 13, 1956) 63 I. D. 257

An offer to lease land which cannot be encompassed within a six-mile square is subject to rejection and where a lease is issued for part of the land embraced in the offer it must be canceled as to that land which is embraced in a proper offer filed prior to the issuance of the lease in order that the statutory preference right of the party first making a proper offer may be honored.

Arnold R. Gilbert, A-27303 (Sept. 10, 1956) 63 I. D. 328

A noncompetitive oil and gas lease covering land in excess of a 6-mile square issued without regard to the departmental regulation which so limits the area of such leases must be canceled when the violation of the regulation is disclosed and there is pending a qualified junior application for the same land.

Lynn Nelson, Uranium King Corporation, A-27795 (Jan. 21, 1959) 66 I. D. 14

An oil and gas lease offer which fails to comply with the departmental regulation requiring that leased lands not exceed an area 6 miles square is entitled to priority only from the time that the defect is remedied by relinquishment of land outside a 6-mile square area.

Cecil R. Fuller, Executor of the Estate of Aileen S. Fuller, A-28020 (Aug. 11, 1959)

Where an oil and gas lease offer includes certain lands which are properly described and others which are indefinitely described and the indefiniteness of the description of part of the land makes impossible a determination whether the entire offer describes land which can be contained in a 6-mile square area, and the description in the offer does not violate the 6-mile square requirement, the offer is not subject to rejection for violation of the 6-mile square rule.

Duncan Miller, A-28035 (Oct. 30, 1959) 66 I. D. 370

SUSPENSION OF OPERATIONS AND PRODUCTION

A suspension of production under an oil and gas lease cannot be granted where the lease contains neither a producing well nor a well capable of production, even though such a discovery had been made on the lease as would support a determination that part of the leased land is situated on the known geological structure of a producing oil or gas field.

H. K. Riddle, A-27079 (Mar. 15, 1955)
62 I. D. 81

Where there are no intervening rights, the Secretary of the Interior has authority to give his assent after the expiration of the primary term of an oil and gas lease to a suspension of operations and production in effect prior to the expiration of the lease, with a consequent revival of the lease term. Whether such authority will be exercised depends upon whether the lessee has exercised due diligence in requesting the suspension and upon other pertinent factors.

Robert E. Mead, Griffith Moore, A-27071
(Mar. 23, 1955) 62 I. D. 111

A grant of a suspension of production only cannot be made where there is no production possible from the lease.

Section 39 of the Mineral Leasing Act authorizing the extension of a lease term by adding thereto any period of time during which operations and production are suspended is not applicable in a situation where no well capable of producing oil or gas has been drilled on land covered by a competitive lease during the primary term of the lease and where there is no evidence that the grant of a suspension would be in the interest of conservation.

Ben F. Swisher, A-27201 (Nov. 21, 1955)

Under an Indian tribal oil and gas lease which provided as a condition to its existence that oil and gas be produced in paying quantities, upon a cessation of production no authority is vested in the Secretary of the Interior to allow a suspension of operations and thereby continue the term of the lease.

The Superior Oil Company and The British-American Oil Producing Company, IA-697
(Mar. 8, 1957) 64 I. D. 49

TERMINATION

An oil and gas lease which was valid when issued terminates by operation of law when the lessee thereunder takes office as, and assumes the duties of, a Member of Congress.

John E. Miles, A-27075, A-27144 (April 11, 1955) 62 I. D. 135

The issuance of a patent excepting and reserving to the United States the oil and gas deposits but providing that title to the same shall vest in the patentee upon termination of an outstanding oil and gas lease, does not preclude the extension of the oil and gas lease authorized in section 17 of the Mineral Leasing Act as amended August 8, 1946 (60 Stat. 951; 30 U.S.C. 226).

Whether Solicitor's Opinion M-36254 (December 28, 1954) Effects a Withdrawal From Oil and Gas Leasing of Lands Disposed of Under a Patent Which (a) Excepts Oil and Gas Deposits Previously Leased but (b) Provides that Title to Such Deposits Shall Vest in the Patentee Upon Termination of the Lease, M-36254 (Supp.)
(May 10, 1955) 62 I. D. 177

Where an oil and gas lease was issued for a period of 10 years and so long thereafter as oil or gas is produced in paying quantities and production from the lease was obtained during the primary term but such production ceased prior to the expiration date of the primary term and was later resumed for a one month period commencing some time after such expiration date, the lease is deemed to have expired by operation of law at the end of the primary term.

James Shelton, A-27116 (June 20, 1955)
62 I. D. 236

The provisions of the act of July 29, 1954, automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease apply to leases issued prior to July 29, 1954 only after the lessee has filed a written notice of his consent to have his lease bound by this provision.

Noel Teuscher, A-27195 (Dec. 19, 1955)
62 I. D. 470

The provisions of the act of July 29, 1954, automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease apply to leases

OIL AND GAS LEASES--Continued

TERMINATION--Continued

issued prior to July 29, 1954, only after the lessee has filed a written notice of his consent to have his lease bound by this provision.

Stansbury, Inc., A-27396 (Nov. 20, 1956)

Under section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946, a competitive lease in its extended term by reason of production terminates by operation of law when production ceases unless diligent drilling operations are being conducted on the lease at that time, in the absence of an order under section 39 suspending operations and production on the lease.

Steelco Drilling Corporation, A-27435 (May 31, 1957) 64 I. D. 214

Where an oil and gas lease is automatically terminated because of the lessee's failure to pay the annual rental when due, the land in the lease is not available for the filing of offers to lease until the termination is noted on the tract book.

W. V. Moore, A-27497 (Nov. 19, 1957) 64 I. D. 419

Section 1(7) of the act of July 29, 1954, is applicable only to those leases which are extended subject to the statutory condition that the extended lease is subject to the rules and regulations in force at the expiration date of the initial 5-year term of the lease. It does not apply where the extension attaches as a matter of right pursuant to an unconditional grant of Congress upon the happening of a named event. In such case, the right runs from the date of the lease, although it does not attach until the named event occurs.

Application of Section 1(7), Act of July 29, 1954 (68 Stat. 583; 30 U. S. C. sec. 188), to Oil and Gas Leases in their Extended Term Under Various Extension Provisions of the Mineral Leasing Act, M-36490 (Jan. 8, 1958)

The provision of the act of July 29, 1954, automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease applies to a lease issued prior to July 29, 1954, only if the lessee has filed a written notice of his consent to have his lease bound by that provision.

Stanley Odlum and Avila Oil Company, A-27502 (Jan. 13, 1958) 65 I. D. 25

OIL AND GAS LEASES--Continued

TERMINATION--Continued

The act of July 29, 1954, which provides for the automatic termination of leases upon failure of the lessee to pay the annual rental when it is due, does not permit a lessee, by submitting a partial payment of the annual rental for designated acreage in his lease, in effect to relinquish a portion of his lease and to have the portion of the lease represented by the partial payment continue in effect.

D. Miller, A-27591-A (June 23, 1958) 65 I. D. 281

Land included in an oil and gas lease which is automatically terminated because of the lessee's failure to pay the annual rental within the time allowed does not become available for further leasing until the termination of the lease is noted on the tract book.

Wilma Elliott Donohue, A-27652 (Sept. 11, 1958)

The provisions of the act of July 29, 1954, automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease apply to leases issued prior to July 29, 1954, only after the lessee has filed a written notice of his consent to have his lease bound by this provision.

Clyde B. Neill, A-27650 (Sept. 16, 1958)

Where the lessee of a noncompetitive oil and gas lease has filed written consent to have his lease bound by the provision of the act of July 29, 1954, automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease, the lease must be held to have terminated when the rental is not received by the anniversary date, notwithstanding the fact that the lessee mailed a letter to the land office containing payment for the rental within time for it to be received prior to the anniversary date, but the letter was not delivered to the land office in time apparently through no fault of the lessee.

Virginia I. Gail, A-27670 (Sept. 25, 1958)

An oil and gas lease cannot be relinquished in part by the filing of a statement that the lessee does not intend to pay annual rental on a portion of the leased lands, and failure to pay the entire annual rental when due under a lease which is subject to section 1(7) of the act of July 29, 1954, results in the automatic termination of the whole lease.

Mary C. Hagood et al., A-27716 (Nov. 6, 1958)

OIL AND GAS LEASES--Continued

TERMINATION--Continued

Termination of an oil and gas lease subject to the act of July 29, 1954, is required for failure to pay the annual rental in advance on or before the anniversary date of the lease even though the failure to make such payment on time is occasioned by the fault of the postal employees and without fault of the lessee.

Mike Abraham, A-27763 (Dec. 22, 1958)

The assignor of an oil and gas lease may, after the filing of an assignment but prior to its approval, elect to bring the lease under the automatic termination provision of section 7 of the act of July 29, 1954, and the lease remains thereunder whether the assignment is approved prior to or after the anniversary date of the lease. The assignee's concurrence in the election is not essential.

Although a lessee of an oil and gas lease issued prior to July 29, 1954, may elect to bring his lease under the provisions of section 7 of the act of July 29, 1954, whether there is a producing well on it or not, the lease will not automatically terminate for failure to pay the rentals timely, if on the anniversary date of the lease there is on it a producing well.

The fact that rental payments are offered and accepted on a lease that has terminated cannot continue or reinstate the lease.

The provisions of section 31 of the Mineral Leasing Act, as amended, relating to the cancellation of leases for lands known to contain valuable deposits of oil and gas do not apply to leases terminated under the provisions of section 7 of the act of July 29, 1954.

Champlin Oil and Refining Company, Joe N. Champlin, A-27669 (Feb. 3, 1959)
66 I. D. 26

The provisions of the act of July 29, 1954, automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease apply to leases issued prior to July 29, 1954, only after the lessee has filed a written notice of his consent to have his lease bound by this provision.

Maurice L. Cowen, A-27850 (Feb. 19, 1959)

The provisions of the act of July 29, 1954, automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease apply to leases issued prior to July 29, 1954, only after the lessee has filed a written notice of his consent to have his lease bound by this provision.

Murrell Small, A-27879 (Mar. 31, 1959)

OIL AND GAS LEASES--Continued

TERMINATION--Continued

It is the responsibility of the lessee to see that any payment tendered for annual rental under an oil and gas lease is so identified that the local land office can credit the payment to the proper lease account and where payment is not so identified until after the anniversary date of a lease issued after July 29, 1954, the lease terminates by operation of law for failure to pay the rental on or before the anniversary date of the lease.

Howard Arndt, A-27895 (Apr. 20, 1959)

Termination of an oil and gas lease subject to the act of July 29, 1954, is required for failure to pay the annual rental in advance on or before the anniversary date of the lease; mailing of a check in the amount of the required rental which was not received is not sufficient.

Paradox Minerals, Inc., A-28000 (Aug. 5, 1959)

Under the automatic termination provision of section 31 of the Mineral Leasing Act, that upon failure of a lessee to pay his rental on or before the anniversary date the lease will be automatically terminated, a lessee has the whole of the anniversary date, while the land office is open for business, within which to pay the rental, and an oil and gas lease application filed on the anniversary date for land included in the prior lease is prematurely filed and must be rejected, the prior lease being in effect for the whole day.

Duncan Miller, A-28041 (Sept. 23, 1959)
66 I. D. 342

TWENTY-YEAR LEASES

The last sentence of the fourth paragraph of section 17(b) of the Mineral Leasing Act, as amended, relating to the extension of unitized oil and gas leases upon their elimination from a unit agreement or the termination of the unit agreement applies to 20-year oil and gas leases.

H. Leslie Parker, M. N. Wheeler, A-27066 (Mar. 18, 1955) 62 I. D. 88

The approval of a proposed unit agreement may properly be conditioned upon submission of a stipulation or other binding instrument to the effect that those Federal oil and gas leases committed to the agreement which provide for a 5 percent royalty rate shall, at the end of

OIL AND GAS LEASES--Continued

TWENTY-YEAR LEASES--Continued

their respective 20-year terms or any extension thereof, become subject to the same royalty rate payable to the United States as would be applicable to renewals of such leases if the leases were not committed to the unit agreement.

Texas Pacific Coal and Oil Company et al., A-27517 (Sept. 23, 1957) 64 I. D. 363

UNIT AND COOPERATIVE AGREEMENTS

The final paragraph of the South Sand Draw Unit Agreement provides the procedure by which land shall be made subject to the agreement. Unless land is made subject to the agreement in accordance with that procedure, it is not effectively committed to the agreement.

Where a tract of land was not committed to a unit agreement through error and the parties to the agreement and the Department have assumed all along that the land was committed, and where there are no intervening rights to the tract which would be adversely affected by such action, the Department will recognize the tract as having been committed at the time of the original agreement upon the submission by all parties in interest of a proper reformation of the agreement.

The Secretary of the Interior has no authority to reform a unit agreement, approved by him pursuant to the provisions of the Mineral Leasing Act, to include land which, through error, was not committed to the unit agreement.

Shannon Oil Company, A-27119 (June 27, 1955) 62 I. D. 252

The approval of a proposed unit agreement may properly be conditioned upon submission of a stipulation or other binding instrument to the effect that those Federal oil and gas leases committed to the agreement which provide for a 5 percent royalty rate shall, at the end of their respective 20-year terms or any extension thereof, become subject to the same royalty rate payable to the United States as would be applicable to renewals of such leases if the leases were not committed to the unit agreement.

Texas Pacific Coal and Oil Company et al., A-27517 (Sept. 23, 1957) 64 I. D. 363

OIL AND GAS LEASES--Continued

UNIT AND COOPERATIVE AGREEMENTS --Continued

The owner of a noncompetitive oil and gas lease whose lease is committed to a unit plan is not entitled to a 5-year extension of his lease granted by section 17 of the Mineral Leasing Act where the lease is extended by the provisions of section 17(b) of the act.

Seaboard Oil Company, A-27479 (Nov. 7, 1957) 64 I. D. 405

Where the single 5-year extended term of a noncompetitive oil and gas lease committed to a unit agreement expires and thereafter the unit agreement is terminated, both before any production is obtained within the unitized area, the lease is not entitled to the 2-year extension authorized by the second proviso to section 5 of the act of August 8, 1946 (60 Stat. 952; 30 U. S. C. sec. 226(e)), having expired at the end of its 5-year extended term.

Extension of Oil and Gas Lease on Termination of Unit Plan Under Provisions in 30 U. S. C. Sec. 226(e)--Oil and Gas Lease Evanston 022930, M-36499 (Feb. 6, 1958) (Memorandum from Regional Solicitor, Denver, Colorado, to State Supervisor, Bureau of Land Management, Cheyenne, Wyoming, Dec. 17, 1957.)

The provision in the fourth paragraph of section 17(b) of the Mineral Leasing Act added by the act of August 8, 1946 (60 Stat. 952), as amended by the act of July 29, 1954 (68 Stat. 585; 30 U.S.C., Supp. IV, sec. 226(e)), for the extension of the segregated unitized portion of a lease where another portion of the same lease is unitized applies only to that portion of the lease situated outside of the unit area as that area is defined in 30 CFR Part 226. 2(e). It does not authorize the extension of an ununitized portion of a lease situated within the unit area, defined as above.

Whether a Lease Entirely Within a Unitized Area Only Committed as to Part of the Acreage may be Segregated into Two Leases Under Authority of Section 4 of the Act of July 29, 1954 (68 Stat. 585), M-36518 (July 29, 1958)

The inclusion of a lease in a unit plan does not per se change its rental paying status or the application of the automatic termination provision of section 1(7) of the act of July 29, 1954 (68 Stat. 585; 30 U. S. C. sec. 188).

Automatic Termination of Unitized Leases for Failure to Pay Rentals, M-36531 (Oct. 27, 1958)

OIL AND GAS LEASES--Continued

UNIT AND COOPERATIVE AGREEMENTS --Continued

Commitment to a unit agreement of a portion of a lease on which there is production, during the extended five-year term of the lease, will not extend the uncommitted, non-producing portion beyond the fixed term of years or two years from the date of commitment, whichever is longer.

Extension of the Non-Unitized Portion of an Oil and Gas Lease Segregated by Unitization in Its Extended Five-Year Term but After Production Was Obtained, M-36543 (Jan. 23, 1959)

A request for modification of the Geological Survey's approval, as provided by a unit agreement, of the limits of an initial participating area in a particular geologic formation will be denied where there is no evidence that the Geological Survey's determination was erroneous or that it was not in accord with the unit agreement.

Northern Pacific Railway Company, A-27885 (Apr. 27, 1959)

Options on unitized leases are not excepted from option acreage charge. The exception in section 17b of the act /Mineral Leasing Act/ of unitized leases from such charge is limited to holdings or control of leases and an option is not a lease holding or control since as provided in section 27 it shall not be "a taking or holding or control" of a lease under any provision of the act.

Oil and Gas Lease Option Reports (30 U. S. C., 1952 ed., Supp. V, sec. 184), M-36555 (May 18, 1959)

The provision of section 1(7) of the act of July 29, 1954 (68 Stat. 585; 30 U. S. C. sec. 188), excepting from the penalty therein provided oil and gas leases on which there is a well capable of producing oil or gas in paying quantities has no application to unitized oil and gas leases no part of which is situated within the participating area of the unit because the presumption that those leases are producing leases applies only for the purposes stated in the preceding paragraph and has no effect on the rental requirements of such leases or on the penalty fixed by law for a violation of such requirements.

Except to the extent that the Secretary of the Interior, with the consent of the owners of the leases involved, establishes, alters, changes, or revokes requirements of the leases pursuant to the authority contained in section 17b added to the Mineral Leasing Act by the act of August 8, 1946 (60 Stat. 952; 30 U. S. C. sec. 226e), unitization of leases makes no change in their terms, either to enlarge or diminish the rights and duties of the lessees beyond those changes essential to the success of

OIL AND GAS LEASES--Continued

UNIT AND COOPERATIVE AGREEMENTS --Continued

unitization, or to compensate lessees for rights necessarily surrendered by reason of commitment of the leases to the unit agreement. And, where an obligation imposed upon the lessee by the lease continues in effect after unitization, the penalty for violation continues in effect.

Automatic Termination of Unitized Leases for Failure to Pay Rentals, M-36531 (Supp.) (Jul. 20, 1959)

OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS BAY GRANT LANDS

NONMINERAL ENTRIES AND DISPOSALS

An application for an additional homestead on a tract of Oregon and California revested grant land which is currently supporting timber valued at over $11,000 and is of mountainous topography, was properly rejected, since the tract appears more suitable for growing timber than for agricultural use.

William S. Maple, A-27120 (May 17, 1955)

An application for an Indian allotment covering a 40-acre tract of Oregon and California revested grant land which contains over 1,000 M. bd. ft. of mature and second growth timber valued at $30,000 and which may be administered as part of a sustained yield unit is properly rejected since the tract is more suitable for timber production than for agricultural use.

John Johnson, A-26823 (Supp.), (Dec. 18, 1956)

Homestead applications for Oregon and California railroad grant lands are properly rejected where the lands are unsuitable for agricultural purposes and are more valuable for timber production.

Warren H. Goss, Neil N. Sumner, A-27418 (Mar. 18, 1957)

OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS BAY GRANT LANDS--Continued

NONMINERAL ENTRIES AND DISPOSALS --Continued

The Public Works Act of September 3, 1954 (68 Stat. 1146; 43 U. S. C. secs. 931c, 931d), is applicable to O & C lands, even for public recreational facilities purposes subject to the provisions of the O & C act of August 28, 1937 (43 U. S. C. secs. 1181a-1181j), as amended, and notwithstanding that the O & C lands were, in specific terms, excepted from the Recreational and Public Purposes Act of June 4, 1954 (68 Stat. 173; 43 U. S. C. secs. 869, 869-1 to 869-3).

Applicability to O & C Lands, of the Public Works Act of September 3, 1954 (68 Stat. 1146; 43 U. S. C. Secs. 931c, 931d), M-36494 (Mar. 18, 1958)

RIGHTS-OF-WAY

The rights-of-way provided for in 43 CFR 115. 154-179 for the Oregon and California Railroad and Reconveyed Coos Bay Grant lands were primarily for timber roads. Roads "acquired by the United States" as those words are used in those regulations, do not include roads constructed by others under statutory right for mining purposes.

One who applies for a right-of-way under the act of January 21, 1895, must comply with the requirements of the regulations and pay whatever fee that they require. And, whether he acquire a right-of-way under an appropriate rights-of-way act or use the land for that or any other purpose, he must comply with all applicable regulations issued under the Oregon and California Grant land laws, which are directed to the management of the area, but such regulations may not impose fees for the enjoyment of rights granted by other laws unless clearly authorized by law.

Rights of Mining Claimants to Access Over Public Lands to Their Claims, M-36584 (Oct. 20, 1959) 66 I. D. 361

OUTER CONTINENTAL SHELF LANDS ACT
(See also, Oil and Gas Leases)

GENERALLY

The provisions of section 6 of the Outer Continental Shelf Lands Act are applicable equally to leases continued thereunder irrespective of insignificant differences between the terms of leases issued by the State of Louisiana and the State of Texas regarding rentals, annual rentals, annual delay rentals, or delay rentals, which do not of themselves require a different conclusion as to proratability.

Final Rental Payment on Section 6 Leases, Outer Continental Shelf, Adjacent to the State of Texas, M-36391 (Oct. 25, 1956)

The validation provisions of the Outer Continental Shelf Lands Act, when read in conjunction with the Submerged Lands Act, effectuate the legislative objective of protecting equitable interests of persons or companies holding State-issued leases, and the intent of the parties to such leases will be given proper weight in determining whether such leases cover outer Continental Shelf lands.

The Texas Company, A-27385, A-27404, A-27405 (Feb. 12, 1958) 65 I. D. 75

ADMINISTRATIVE CONSTRUCTION

Where the expiration date of a lease as determined by the terms of the lease issued by the State of Texas and the actual expiration date of the primary term of such a lease are different by reason of the continuance of the lease under section 6 of the Outer Continental Shelf Lands Act, with the resulting extension including a fractional lease year, the decision of the Comptroller General, B-126352 (March 2, 1956), with respect to similar leases issued by the State of Louisiana, is applicable with respect to the proration of rentals for the final portion of the primary term of such leases.

Final Rental Payment on Section 6 Leases, Outer Continental Shelf, Adjacent to the State of Texas, M-36391 (Oct. 25, 1956)

Applications for validation of State leases purportedly covering outer Continental shelf lands must be considered in the light of the clear wording of the acts of Congress establish-

OUTER CONTINENTAL SHELF LANDS ACT
--Continued

ADMINISTRATIVE CONSTRUCTION--Continued

ing an equitable basis for approval of such applications by the Secretary of the Interior, as well as the general import of the submerged lands decisions of the United States Supreme Court.

The Texas Company, A-27385, A-27404, A-27405 (Feb. 12, 1958) 65 I. D. 75

BOUNDARIES

A former State lease which was divided into two parts by operation of the Submerged Lands and Outer Continental Shelf Lands Acts does not continue as a single lease subject to its original terms. Instead the portion of the former lease situated on the outer Continental Shelf bears a later effective date, is subject to different terms as to royalties and its primary term will expire at a later date than the portion situated within the State boundaries. It is, therefore, a separate and distinct lease to which the terms of the former State lease, to the extent that they apply, apply separately.

Former State Leases Bisected by the Present State Line Dividing the Submerged Lands From the Outer Continental Shelf, M-36259 (Feb. 18, 1955) 62 I. D. 44

In deciding applications of State lessees for validation of leases in disputed offshore areas, the Secretary of the Interior will adhere to the position taken by the Attorney General in current litigation of issues relating to the location of seaward boundaries of the lessor State.

Where a State lease issued in 1936 purports to cover lands "to the extreme limit * * * of the domain, territory and sovereignty" of the State, it will be construed as intended to apply to all lands historically claimed by the State for purposes of validation under the Outer Continental Shelf Lands Act.

The Texas Company, A-27385, A-27404, A-27405 (Feb. 12, 1958) 65 I. D. 75

OUTER CONTINENTAL SHELF LANDS ACT
--Continued

OIL AND GAS LEASES

A former State lease which was divided into two parts by operation of the Submerged Lands and Outer Continental Shelf Lands Acts does not continue as a single lease subject to its original terms. Instead the portion of the former lease situated on the outer Continental Shelf bears a later effective date, is subject to different terms as to royalties and its primary term will expire at a later date than the portion situated within the State boundaries. It is, therefore, a separate and distinct lease to which the terms of the former State lease, to the extent that they apply, apply separately.

Former State leases which qualify as to part of the acreage under the Outer Continental Shelf Lands Act are subject to rental payments to the United States only for the acreage which is qualified. Where such rentals are on a lump sum basis they should be prorated. Royalties in such case are due the United States only on account of production from the Outer Continental Shelf lease. The payment of royalty to a State from production elsewhere does not affect the lessee's obligation to the United States.

Former State Leases Bisected by the Present State Line Dividing the Submerged Lands From the Outer Continental Shelf, M-36259 (Feb. 18, 1955) 62 I. D. 44

An oil and gas lease maintained under section 6 of the Outer Continental Shelf Lands Act of August 7, 1953 (67 Stat. 465; 43 U.S.C., 1954 Cum. Supp., sec. 1335), is made subject to the regulation contained in 43 CFR 201.14, which authorizes directional drilling from adjoining or adjacent land, by the provisions of 43 CFR 201.110.

Effect of General Outer Continental Shelf Lands Regulations on the Terms of Former State Leases Maintained Pursuant to Section 6 of the Act, M-36271 (June 15, 1955)

Payment of royalties is required with respect to gas produced from certain leases maintained pursuant to section 6 of the Outer Continental Shelf Lands Act of August 7, 1953 (67 Stat. 465; 43 U.S.C. sec. 1335), on which sulphur mining operations are conducted where the gas is used for fuel in the sulphur mining operations because both section 6 of the act and 43 CFR 201.10 provide that the language of "Section 6" leases shall govern regarding royalties.

Royalties on Gas Production used for Sulphur Mining on "Section 6" Outer Continental Shelf Leases, M-36322 (Jan. 17, 1956)

OUTER CONTINENTAL SHELF LANDS ACT
--Continued

OIL AND GAS LEASES--Continued

The possibility of a rental period for less than one year was not contemplated or provided for in either leases issued by the State of Texas or the State of Louisiana which have been continued under section 6 of the Outer Continental Shelf Lands Act.

Final Rental Payment on Section 6 Leases, Outer Continental Shelf, Adjacent to the State of Texas, M-36391 (Oct. 25, 1956)

The Outer Continental Shelf Lands Act does not contain authority for the extension of leases issued under section 8 of that act because the lessee was unable to develop his lease for any period when the lease was involved in litigation. In the absence of a law authorizing such action the term of an oil and gas lease may not be extended.

Authority to Extend the Terms of Oil and Gas Leases Issued Under Section 8 of the Outer Continental Shelf Lands Act, M-36392 (Dec. 21, 1956) 63 I. D. 406

The provisions of section 6(a)(10) of the Outer Continental Shelf Lands Act limiting the period of the primary term and extension thereof to 5 years from the effective date of the act is a limitation on the rights directly granted by that act and not a limitation on the right of the Secretary of the Interior thereafter to grant an extension of the primary term of such a lease if authorized by the act or by the law of the State as that law existed prior to the date of the act.

Effect of Section 6(a)(10) of the Outer Continental Shelf Lands Act on the Extension of a Lease for the Period that Development is Interrupted by Litigation at the Instance of the United States, M-36431 (May 6, 1957)

REFUNDS

There is no authority of law for refunding excess rentals paid for a right-of-way granted under section 5(c) of the act /Outer Continental Shelf Lands Act/ where the excess has been turned into the Treasury. Relief may be afforded by crediting the excess on future rentals as they become due.

OUTER CONTINENTAL SHELF LANDS ACT
--Continued

RIGHTS-OF-WAY

Excess rentals for rights-of-way granted under section 5(c) of the Outer Continental Shelf Lands Act do not come within the scope of section 10 of the act.

Refund, Right-of-Way, M-36425 (Mar. 4, 1957)

STATE LEASES

Generally

Undeveloped oil and gas leases determined by the Secretary to be entitled to receive the benefits provided for by subsection 6(b) of the Outer Continental Shelf Lands Act may be extended under that subsection for a period equivalent to the period that their development is prevented by the Supreme Court's order of June 11, 1956, issued in the case of United States v. State of Louisiana, Original No. 15 (351 U. S. 978), or for a period equivalent to the remainder of their primary terms as extended as of June 11, 1956, whichever is shorter.

Authority to Extend the Terms of Oil and Gas Leases on the Outer Continental Shelf for a Period Equivalent to the Period During Which Development of the Leases is Prevented as the Result of Litigation Instituted by the Lessor, M-36364 (Sept. 19, 1956) 63 I. D. 337

Where a State lease is ambiguous as to extent, such lease for the purposes of validation will not be construed as including lands in the Gulf of Mexico beyond a line 3 marine leagues from the shoreline, in as much as Congress rejected State claims beyond that line in enacting the Submerged Lands Act.

The Texas Company, A-27385, A-27404, A-27405 (Feb. 12, 1958) 65 I. D. 75

Conflicts with

The "other privileges" clause of leases issued by the State of Louisiana and maintained under section 6 of the Outer Continental Shelf Lands Act of August 7, 1953 (67 Stat. 465; 43 U. S. C., sec. 1335), does not grant the lessee the right to use or take salt deposits

OUTER CONTINENTAL SHELF LANDS ACT
--Continued

STATE LEASES--Continued

Conflicts with--Continued

from the leased areas for the purposes of facilitating sulphur mining operations thereon.

Application for Free Use of Salt Deposits for Sulphur Mining Operations on "Section 6" Outer Continental Shelf Leases, M-36548 (Jan. 19, 1959)

Recognition of

The provisions of section 6(a)(10) of the Outer Continental Shelf Lands Act limiting the period of the primary term and extension thereof to 5 years from the effective date of the act is a limitation on the rights directly granted by that act and not a limitation on the right of the Secretary of the Interior thereafter to grant an extension of the primary term of such a lease if authorized by the act or by the law of the State as that law existed prior to the date of the act.

Effect of Section 6(a)(10) of the Outer Continental Shelf Lands Act on the Extension of a Lease for the Period that Development is Interrupted by Litigation at the Instance of the United States, M-36431 (May 6, 1957)

The Secretary of the Interior has final administrative authority to determine under the provisions of the Outer Continental Shelf Lands Act whether a State lease offered for validation covers submerged lands of the outer Continental Shelf.

The fact that an applicant for validation of a State lease files a certificate pursuant to section 6(a)(3)(A) of the Outer Continental Shelf Lands Act does not limit the authority of the Secretary to make his own determination under section 6(a)(2) of the act.

The Texas Company, A-27385, A-27404, A-27405 (Feb. 12, 1958) 65 I. D. 75

PATENTS OF PUBLIC LANDS

GENERALLY

The act of June 4, 1954 (68 Stat. 173), amending the act of June 14, 1926 (44 Stat. 741; 43 U.S.C. sec. 869), did not terminate the reversion of title and land use provisions contained in patents issued under the act of 1926 and which had been outstanding for 25 years when the amendatory act was passed.

Effect of Act of June 4, 1954 (68 Stat. 173), Upon Certain Restrictive Provisions Contained in Patents Issued Under the Act of June 14, 1926 (44 Stat. 741; 43 U.S.C. sec. 869), M-36330 (Feb. 6, 1956)

Every patent for public or Indian lands carries with it an implied affirmation of finding of every fact made prerequisite to its issue.

Availability of Lands for Oil and Gas Leasing--Boundaries of the Fort Peck Indian Reservation, M-36539 (Nov. 19, 1958)

When the Department has certified lands to a State for the use and benefit of a railroad or issued a patent to it under the terms of a grant, the legal title is no longer in the United States and the Department has no further jurisdiction over the certified or patented lands.

H. S. Davis et al., A-27758, A-27849, A-27858 (Jan. 30, 1959)

A protest which alleges that mining claims have been located upon land which has been surveyed at the request of a settler, does not, without further proceedings, amount to a pending protest or contest within the meaning of the proviso to section 7 of the act of March 3, 1891.

Where a protestant files a protest against the issuance of a patent for a homestead entry in which it is alleged that the entryman has alienated his entry prior to submission of final proof, notice of the charge is served upon the entryman and he responds to the charge in his final proof, there is a protest pending within the meaning of the proviso to section 7 of the act of March 3, 1891, which will prevent the entry from being confirmed upon the lapse of 2 years from the date of the issuance of the receipt acknowledging payment of final fees and commissions.

Audrey I. Cutting, George Peter Smith, A-28031 (Oct. 8, 1959) 66 I. D. 348

PATENTS OF PUBLIC LANDS--Continued

GENERALLY--Continued

The Department of the Interior may consent to a transfer of an interest in lands for which patent has issued under the Recreation and Public Purposes Act only if the transfer is to be made to a qualified party for a recreational or public purpose not authorized under any other law except the Small Tract Act.

Changes of Use or Additional Use of Land for Which Patent Has Issued Under the Recreation and Public Purposes Act (43 U. S. C., sec. 869, et seq.), M-36588 (Dec. 11, 1959)

AMENDMENTS

Where a patent on an enlarged homestead entry with a reservation to the United States of oil and gas was issued more than 36 years ago and the entryman later filed a petition requesting issuance of an unrestricted patent on the entry, which petition was denied more than 33 years ago, and the entryman did not appeal from the denial, the matter is res adjudicata and will not be reopened upon an application for an unrestricted patent by a subsequent owner of a portion of the land who does not conclusively establish that the mineral reservation was unauthorized and who has no equities entitling him to an unrestricted patent.

Edward Christman et al., A-27052 (April 1, 1955) 62 I. D. 127

Where a patent was issued in 1919 containing a mineral reservation to the United States of all minerals under the Stockraising Homestead Act of December 29, 1916, and the patentee accepted the patent without objection, a supplemental patent without a mineral reservation as to part of the land as to which the reservation may have been erroneously imposed will not be issued where the patentee did not object and the successor to the patentee has held title for 24 years without protest and the Department has issued an oil and gas lease for the land involved.

Conrad Luft, A-27246 (Feb. 13, 1956) 63 I. D. 46

After land has been surveyed and patented by the United States, the boundaries cannot be changed by a resurvey to the prejudice of the patentee.

Nelson D. Jay, A-27468 (Dec. 4, 1957)

PATENTS OF PUBLIC LANDS--Continued

AMENDMENTS--Continued

By departmental regulation entries which are void ab initio are not subject to adjustment or amendment under section 2372 of the Revised Statutes, as amended.

Section 2372 of the Revised Statutes, as amended, authorizing the amendment of entries and patents in order to correct errors in the description of lands entered and the regulations issued pursuant thereto do not permit amendment of a patent in behalf of persons who are not transferees deriving title from the one who entered or located the land covered by the patent the amendment of which is being sought or transferees of such entryman as to the land which it is sought to have the patent amended to cover.

Patents to public land cannot be amended pursuant to section 2372 of the Revised Statutes, as amended, where the showing required by the statute as to the circumstances of the error is not made.

Henry S. Morgan et al., A-27556 (June 30, 1958) 65 I. D. 284

EFFECT

Where public land has been patented, this Department has no further jurisdiction over the land.

Unless a suit to cancel a patent for public land erroneously issued is brought within 6 years of the issuance of the patent, the patent is good against the United States.

Newton's Fork Gold Mining Company, A-27109 (April 27, 1955)

Where public lands are patented under a law requiring a reservation of minerals to the United States but without any provision for their disposal, authority for such disposal must be sought for elsewhere than in that law.

Applicability of 43 CFR 199.40-199.56 Authorizing Mineral Disposal in Certain Lands to Lands Acquired by the City and County of Denver, Colorado, Under the act of August 25, 1914 (38 Stat. 706), M-36279 (July 19, 1955)

PATENTS OF PUBLIC LANDS--Continued

EFFECT--Continued

A protest against the public sale of a tract of land, based on the protestant's claim of title to the land derived from a Spanish grant, is properly rejected where the patent issued in confirmation of the grant does not include the particular tract; however, the protestant may be given an opportunity to apply for the tract under the Color of Title Act.

Lamar Louise Curry, A-28023 (Aug. 10, 1959)

Although issued by mistake and inadvertence, a patent issued under authority of law vests title in the patentee and removes from the jurisdiction of this Department inquiry into and consideration of all disputed questions of fact, as well as of rights to land.

Kelso B. Morris, A-28070 (Oct. 26, 1959)

RESERVATIONS

Where public lands are patented under a law requiring a reservation of minerals to the United States but without any provision for their disposal, authority for such disposal must be sought for elsewhere than in that law.

Applicability of 43 CFR 199.40-199.56 Authorizing Mineral Disposal in Certain Lands to Lands Acquired by the City and County of Denver, Colorado, Under the act of August 25, 1914 (38 Stat. 706), M-36279 (July 19 1955)

The inclusion in a patent of railroad grant lands of an exception of all mineral lands "should any be found to exist" does not diminish the estate vested in the grantee upon discovery of minerals in the land since the issuance of the patent constitutes a conclusive determination by the United States of the nonmineral character of the land, and the exception is void.

Patricia T. Zebal et al., A-27616 (July 18, 1958) 65 I. D. 293

A proposed private exchange is properly subject to a reservation of a right-of-way across the selected land for roads needed in connection with operation of an adjoining ranch.

James S. and Harold J. Woosley, A-27887 (Jul. 22, 1959)

PATENTS OF PUBLIC LANDS--Continued

RESERVATIONS--Continued

Where, after a tract of land was determined to be subject to patent as a class 2 claim under the Color of Title Act, a mineral lease was issued thereon, but the lease is relinquished before a patent is granted to the color of title applicant, the land may be patented without a reservation of oil and gas, all else being regular.

A mineral reservation is not required in a patent granted under the Color of Title Act if the claimant so requests and has satisfactorily established that the requirements of the act have been complied with by him and his predecessors for the period beginning not later than January 1, 1901, to the date of the application and if the land is not within a mineral withdrawal or subject to an outstanding mineral lease at the time of issuance of the patent.

Lela Oates Ormond, A-27977 (Aug. 5, 1959)

Reservations of minerals may be inserted in patents issued under the act of March 31, 1950 (64 Stat. 39; 43 U. S. C., 1952 ed., sec. 375b-375f), only where either the act of July 17, 1914 (38 Stat. 509; 30 U. S. C., 1952 ed., sec. 121) or the act of June 22, 1910 (36 Stat. 583; 30 U. S. C., 1952 ed., sec. 83) applies.

Mineral Reservations in Patents to be Issued Under the Act of March 31, 1950 (64 Stat. 39; 43 U. S. C., 1952 ed., sec. 375b-375f), M-36583 (Sept. 29, 1959)

SUITS TO CANCEL

In the absence of fraud, suits by the United States to cancel patents to public lands must be brought within 6 years of the issuance of such patents.

Newton's Fork Gold Mining Company, A-27109 (April 27, 1955)

A patent inadvertently issued while an appeal from rejection of a conflicting application is pending cannot be withdrawn, and a suit to cancel the patent will not be recommended where there was no fraud in the inducement or substantial equities in the applicant which will be destroyed.

Miles W. Payne, A-28030 (Aug. 17, 1959)

PATENTS OF PUBLIC LANDS--Continued

SUITS TO CANCEL--Continued

A mistake in the issuance of a patent may justify a recommendation by this Department that the Attorney General bring suit to cancel the patent.

Where public land was sold at public sale and an unrestricted patent was issued without consideration of a prior oil and gas lease offer, the Department will not recommend to the Attorney General that a suit to cancel the patent be brought where the Government has no interest in the land, is under no obligation to anyone who has suffered by the issuance of the patent, the public interest does not require it, and no significant equitable considerations are involved.

Kelso B. Morris, A-28070 (Oct. 26, 1959)

Where tracts of land sold at public sale have been patented pending an appeal by an unsuccessful bidder for the land, this Department has lost jurisdiction over the land and will not recommend institution of action to cancel the patents where the unsuccessful bidder does not request such action and no factor of public interest requires it.

Charles Kik et al., A-27872 (Dec. 1, 1959)

PHOSPHATE LEASES AND PERMITS

GENERALLY

Where a lessee holds 15 phosphate leases but conducts its mining operations on only one of the leases, holding the remaining 14 leases as a reserve, it will not be granted a waiver and suspension of the minimum royalty requirements of the 14 leases or a suspension of operations and rentals on those leases where it fails to show the existence of the factors required by section 39 of the Mineral Leasing Act as a condition to the granting of such relief.

Monsanto Chemical Company, A-27132 (Nov. 1, 1955)

The amendment of the phosphate regulations to omit the minimum expenditure requirement did not of itself amend the terms of pending offers of sale which included a minimum expenditure requirement as prescribed in the former

PHOSPHATE LEASES AND PERMITS--Continued

GENERALLY--Continued

regulations, nor does the amended regulation prevent the imposition of a minimum expenditure requirement in future offers of sale.

Calazona Fertilizer Company, A-27710 (Jan. 19, 1959) 66 I. D. 4

LEASES

Where a phosphate lease sale is held with a minimum expenditure requirement as a condition of the sale and a bid is offered on that basis and the manager purports to accept the bid free from the minimum expenditure requirement, the purported acceptance is not an acceptance but a counter offer which does not result in a contract.

A decision declaring a high bid at a phosphate lease sale and stating that a lease will be offered to the high bidder but not until the lands are surveyed does not constitute an acceptance of the bid.

Where a phosphate lease sale is advertised on terms which include a minimum expenditure requirement and a bid is submitted on that basis, but after the offer of sale is issued and before the date of the sale the phosphate regulations are amended to eliminate the minimum expenditure requirement, the bid will not be accepted but the sale will be re-advertised.

Calazona Fertilizer Company, A-27710 (Jan. 19, 1959) 66 I. D. 4

ROYALTIES

Where a lessee holds 15 phosphate leases but conducts its mining operations on only one of the leases, holding the remaining 14 leases as a reserve, it will not be granted a waiver and suspension of the minimum royalty requirements of the 14 leases or a suspension of operations and rentals on those leases where it fails to show the existence of the factors required by section 39 of the Mineral Leasing Act as a condition to the granting of such relief.

Monsanto Chemical Company, A-27132 (Nov. 1 1955)

PITTMAN ACT

An application under the Pittman Act must be for contiguous land and cannot embrace cornering sections of land.

Charles F. and Charles P. McCuskey, A-27247 (Jan. 20, 1956) 63 I. D. 22

The existence of a shallow water table under land included in a Pittman Act application does not furnish a basis for rejecting the application where it appears that wells drilled to this water can yield only quantities of water insufficient for irrigation.

A Pittman Act application must be rejected as to land which contains soils unsuitable for agriculture and topography unsuitable for cultivation.

Where land for which an application is filed under the Pittman Act lies in the same general area as lands in which underground water in sufficient quantities for successful irrigation at a reasonable cost has already been discovered, and there is no convincing reason to believe that this source of water does not underlie the land applied for, it is proper to reject the application.

Benjamin C. Spencer, A-27234 (Mar. 12, 1956)

An application filed under the Pittman Act is properly rejected when the land described therein is already withdrawn for possible purchase by the State of Nevada under authority of the act of March 6, 1958.

Anna M. Loney, A-28033 (Aug. 20, 1959)

Nevada land classified as proper for permit to explore for subsurface water is subject to acquisition under the Pittman Act.

Nels L. Swenson, A-28024 (Aug. 20, 1959)

POTASSIUM LEASES AND PERMITS

LEASES

Where the Geological Survey has properly determined that the limits of a potash bearing formation run through parts of several legal subdivisions, it is proper to require an applicant for a fringe area lease to lease the whole of each of such subdivisions.

The Department's policy on issuing a fringe area potassium lease requires that a lease be issued for all of the fringe area that it believes to contain potash ore adjacent to a mining unit which has reached the limit of its acreage holdings and not for just the parts of the fringe area that an applicant applies for.

Potash Company of America, A-27140 (Nov. 9, 1955)

An application for a preference-right potassium lease timely filed by the assignee of a potassium prospecting permit must be rejected where the proposed assignment itself is not filed until after the expiration of the 30-day period following the permit term during which the application for a lease must be filed.

Kenneth G. Bishop, A-27687 (Oct. 31, 1958)

PERMITS

An application for a potassium permit that is filed before the cancellation of a previous permit for the same land is noted on the tract books at the land office must be rejected.

Robert L. Smith, A-27107 (April 26, 1955)

Under the Mineral Leasing Act, lands known to contain valuable deposits of potassium are subject to lease only, and no prospecting permit may be issued for such lands.

An application for a potassium prospecting permit will be rejected when the land applied for is known to contain commercial deposits of potassium.

Charles W. Hicks, A-27130 (June 6, 1955)

POTASSIUM LEASES AND PERMITS--Continued

PERMITS--Continued

An application for a potassium permit which covers more than 2, 560 acres will not be rejected in its entirety but the permit will be issued for only 2, 560 acres or less.

John R. Whipple, Utah Magnesium Corporation, A-27399 (Dec. 17, 1956)

Upon the expiration of the term of a sodium prospecting permit, the lands it covered became immediately open to filing for a potassium prospecting permit without waiting for the expiration to be noted on the records of the land office.

J. D. Archer et al., A-27451 (June 24, 1957)

POWER

DEVELOPMENT AND SALE

Under a contract between the Government, now represented by the Southeastern Power Administration and the Georgia Power Company, provision was made for the disposition of the entire output of the Allatoona power project to the Company, and for the operation of the Allatoona Reservoir in accordance with a mutually acceptable rule curve and instructions. The contract also provided that the Company would pay to the Government for the electrical energy equivalent of water wasted due to departure by the Company from the current rule curve and instructions not attributable to a regulation of the Corps of Engineers. In 1951, in order to meet unusual power demands of the Atomic Energy Commission, it was agreed between the parties that the power pool elevation at Allatoona should be raised from elevation 835 to 838, and kept as high as possible consistent with the emergency power demand. Although a rule curve was also prepared in connection with this operation, it was intended to be informal, and to serve merely as a guide to probable operations. The Southeastern Power Administration was aware that operations were not being conducted in accordance with the informal rule curve but acquiesced therein. In these circumstances, the provision of the contract relative

POWER--Continued

DEVELOPMENT AND SALE--Continued

to the wasting of water must be held not to have been applicable during the emergency period, and the Georgia Power Company should not have been billed for the electrical energy equivalent of the water wasted at the direction of the Corps of Engineers during the emergency period.

Appeal of Georgia Power Company, IBCA-31 (April 22, 1955)

An operating agreement between the Secretary of the Interior and private utilities defining the areas to be served by each may properly be entered into where the relevant statutes contain no prohibition against such an agreement.

Officers and employees of the United States are without authority to sell or lease property belonging to the United States unless specifically authorized by the Congress to do so.

Where the Congress has clothed the Secretary of the Interior with authority to manage and operate an electric power system, that authority may not be transferred to a private utility or independent board without a clear indication on the part of Congress that such action may be taken.

Authority to Manage and Dispose of the San Carlos Power System, M-36296 (July 25, 1955) 62 I. D. 285

PRACTICE BEFORE THE DEPARTMENT
(See also, Rules of Practice)

PERSONS QUALIFIED TO PRACTICE

Where an appeal to the Secretary is signed and filed by an attorney-in-fact for the appellant and the attorney-in-fact does not appear to qualify as one entitled to practice before the Department, dismissal of the appeal would appear to be justified.

Lily L. Pearson et al., A-27505 (Nov. 15, 1957)

An attorney-in-fact who does not appear to fall in the categories of persons authorized to practice before the Department is not authorized to practice merely because he has a power of attorney.

Hattie M. Fults, Ernest Maloof, A-27509 (Nov. 19, 1957)

PRESIDENT OF THE UNITED STATES

The unentered and undisposed of ceded Indian lands of the Red Lake Indian Reservation restored to the Indians and to their reservation by Secretarial order of February 22, 1945, issued pursuant to sections 3 and 7 of the Indian Reorganization Act (48 Stat. 984), as amended, were properly restored to Indian ownership, and the timber on such restored lands may be sold under applicable laws and regulations.

Presidential Proclamations of January 15, 1908 (35 Stat. 2189), and May 3, 1912 (37 Stat. 1741), setting aside a 60-foot strip of public land between the United States and Canada did not include therein ceded Indian lands as such lands were not unentered or unreserved public lands of the United States.

Status of Land Lying Within a Defined 60-foot Boundary Line Between the United States and Canada, M-36368 (Sept. 12, 1956)

PRIVATE EXCHANGES

GENERALLY

No rights in land are initiated by the mere filing of an application to exchange lands under section 8(b) of the Taylor Grazing Act.

Clyde H. Ault, A-27125 (Jan. 26, 1955)

An appeal from a decision of the Lands Officer of the Bureau of Land Management rejecting a private exchange application will not be decided on the merits when action taken by the appellant to amend his application after the filing of the appeal has made a decision on the merits unnecessary.

Marcellus Palmer, A-27193 (Aug. 2, 1955)

Lands the title to which has been conveyed to the United States pursuant to a private exchange authorized by section 8 of the Taylor Grazing Act do not become available for offers to lease for oil and gas simply upon the acceptance of title on behalf of the United States, but only when an order is issued opening them to such disposition.

Southern California Petroleum Corporation, A-27851 (Feb. 25, 1959) 66 I. D. 61

PRIVATE EXCHANGES--Continued

GENERALLY--Continued

Lands the title to which is conveyed to the United States pursuant to a private exchange authorized by section 8(b) of the Taylor Grazing Act do not become available for oil and gas leasing simply upon acceptance of title by the United States, but only when an order is issued opening the lands to such disposition.

J. E. Dawson, Jr., A-27838 (Mar. 2, 1959)

A proposed private exchange is properly subject to a reservation of a right-of-way across the selected land for roads needed in connection with operation of an adjoining ranch.

James S. and Harold J. Woosley, A-27887 (Jul. 22, 1959)

CLASSIFICATION

Where consummation of a private exchange would result in the blocking up of the Government land in the area in a more uniform land pattern and the offered lands exceed the value of the selected lands, applications filed under the Small Tract Act for the selected lands may be properly rejected.

John R. Ross et al., A-27259 (Mar. 12, 1956)

EQUAL VALUES

A protest against a private exchange application is properly dismissed where the record shows that the proposed exchange complies with the statutory requirements that the exchange benefit the public interest and that the value of the selected lands not exceed the value of the offered lands, and where the allegations by the protestants do not provide a basis for sustaining the protest.

A. J. and Myrtle Barnes, A-27041 (May 26, 1955)

Where part of the land selected under a private exchange application was withdrawn from such dispositions after it was determined that the exchange complied with the statutory requirements, the case will be remanded to

PRIVATE EXCHANGES--Continued

EQUAL VALUES--Continued

allow the applicant to select additional land or to delete part of the offered land in order to more nearly equalize values of the lands offered and those selected in exchange.

Glenera Sheehan Hunter et al., A-27267 (Feb. 29, 1956)

A private exchange application under section 8 of the Taylor Grazing Act, as amended, is properly rejected where it is determined that selected lands exceed in value the lands offered and that the exchange would not be in the public interest.

F. N. Bard, A-27690 (Oct. 6, 1958)

A protest against a private exchange application is properly dismissed when the record shows that the proposed exchange complies with the statutory requirements that the value of the selected land not exceed the value of the offered land and that the exchange benefit the public interests and the allegations of the protestant do not provide a basis for sustaining the protest.

Utah-Idaho Graziers Association, Peter McKellar, A-28100 (Dec. 22, 1959)

PROTESTS

A protest against a private exchange application is properly dismissed where the record shows that the proposed exchange complies with the statutory requirements that the exchange benefit the public interest and that the value of the selected lands not exceed the value of the offered lands, and where the allegations by the protestants do not provide a basis for sustaining the protest.

A. J. and Myrtle Barnes, A-27041 (May 26, 1955)

Where the notice of publication of a private exchange states that the purpose of the notice is to give persons objecting to the exchange an opportunity to file their objections within 45 days after the first publication of the notice, a protest filed after the end of the 45-day period can be considered by the Department.

Willis N. Farlow et al., A-27121 (May 27, 1955)

PRIVATE EXCHANGES--Continued

PROTESTS--Continued

A mere statement, unsubstantiated by competent evidence, that the lands offered in a proposed private exchange are not of equal value with the selected lands is insufficient to sustain a protest against the exchange.

Where a proposed exchange meets the statutory requirements of equal value between the offered and the selected lands, and it appears that the exchange will be in the public interest, a protest against the exchange is properly dismissed.

A. R. Spikes, A-27123 (June 29, 1955)

A protest against a private exchange application is properly dismissed where the proposed exchange complies with the statutory requirements and the assertions by the protestants do not provide a basis for sustaining the protest.

Charles E. Kunzler et al., John J. Kunzler, A-27126 (Aug. 31, 1955)

A protest against a private exchange is properly dismissed where the exchange complies with the statutory requirements that the value of the selected lands not exceed the value of the offered lands and that the exchange benefit the public interest and where the assertions by the protestants do not provide a basis for sustaining the protest.

Glenera Sheehan Hunter et al., A-27267 (Feb. 29, 1956)

A protest against the allowance of a proposed private exchange is properly dismissed where the exchange complies with the statutory requirements that the value of the selected lands not exceed the value of the offered lands and that the exchange benefits the public interest and where the protestants' assertions that they will suffer loss from deprivation of grazing privileges on the selected lands are not sustained by the record.

Harold Stewart and Cecil Fisher, A-27557 (Apr. 8, 1958)

Protests against private exchanges are properly dismissed where the exchanges comply with the statutory requirements as to value and public interest and where the assertions by the protestants do not provide a basis for sustaining the protests.

J. D. Critchlow et al., A-27907 (Aug. 4, 1959)

PRIVATE EXCHANGES--Continued

PROTESTS--Continued

A protest against a private exchange application is properly dismissed when the record shows that the proposed exchange complies with the statutory requirements that the value of the selected land not exceed the value of the offered land and that the exchange benefit the public interests and the allegations of the protestant do not provide a basis for sustaining the protest.

Utah-Idaho Graziers Association, Peter McKellar, A-28100 (Dec. 22, 1959)

PUBLIC INTEREST

Where no benefit to the public interest is shown, it is proper to reject an application for a private exchange under section 8(b) of the Taylor Grazing Act.

Clyde H. Ault, A-27125 (Jan. 26, 1955)

Where consummation of a private exchange would result in the blocking out of an area of public land and the disposal of an isolated tract of public land, but there is little need for acquiring the offered land and disposal of the selected land would seriously disrupt the grazing operations of two lessees of the selected land, there does not appear to be such a benefit to the public interest as to warrant allowance of the exchange.

Willis N. Farlow et al., A-27121 (May 27, 1955)
62 I. D. 206

The fact that consummation of a private exchange may adversely affect the livestock operations of a protestant who has enjoyed grazing privileges on the selected lands does not warrant a determination that the exchange is not in the public interest.

A. R. Spikes, A-27123 (June 29, 1955)

Where consummation of a private exchange would be chiefly of benefit to the applicant, would not improve the land pattern to any extent or offer any particular advantage to the Government, and would impair to some extent the grazing operations of a lessee of the selected lands, the exchange is properly rejected.

Marlow D. Butler, Lala A. Butler, A-27186 (Oct. 10, 1955)

PRIVATE EXCHANGES--Continued

PUBLIC INTEREST--Continued

Where land offered in a private exchange consists largely of scattered isolated tracts which would be difficult to administer and the selected land comprises a reasonably compact area, the exchange is not in the public interest and should be rejected even though the offered land may be more valuable than the selected land.

Frank W. Gloster, A-27209 (Nov. 9, 1955)

Where the offered lands in a private exchange are not desired by any Federal agency and would not improve the public land pattern or advance any governmental program, the fact that the applicant maintains an establishment on the selected lands under a special land use permit which sometimes is useful to motorists is not sufficient to make the private exchange in the public interest.

Joseph E. and Minnie A. Stitz, A-27476 (Oct. 15, 1957)

A private exchange is not in the public interest where eight scattered parcels, six of which are completely surrounded by privately owned land, are offered in exchange for public land.

Renz L. Jennings, A-27589 (June 25, 1958)

A private exchange application under section 8 of the Taylor Grazing Act, as amended, is properly rejected where it is determined that selected lands exceed in value the lands offered and that the exchange would not be in the public interest.

F. N. Bard, A-27690 (Oct. 6, 1958)

A private exchange application is properly rejected where the record indicates that allowance of the application would not benefit the public interest.

Nick Chournos, A-27812 (Feb. 3, 1959)

An application to exchange privately-owned land needed for defense purposes for public land of equal value or less will be preferred over a conflicting private exchange application when the offered lands are not needed for national security purposes other factors in the public interest being substantially equal.

Owen Ault, A-27845 (Mar. 30, 1959)

PRIVATE EXCHANGES--Continued

PUBLIC INTEREST--Continued

The approval of a private exchange is in the public interest when the selected lands are classified as suitable for cultivation and their disposal will not seriously impair local range uses and when the offered lands of greater appraised value are in an area where the Government is seeking to consolidate land patterns.

Grantsville Soil Conservation District, A-27836 (Apr. 14, 1959)

Private exchange applications are properly rejected where allowance of the applications would not benefit the public interest.

Marcellus Palmer, Ralph Taylor, A-27903 (May 14, 1959)

A private exchange application is properly rejected when the allowance of the application would not benefit the public interest.

Francis Frazier, A-27939 (Jul. 20, 1959)

Private exchange applications are properly rejected where the proposed exchanges would not benefit the public interest.

Charles E. Kunzler, A-28050 (Oct. 28, 1959)

PUBLIC LANDS

(See also, Accretion, Boundaries, Surveys of Public Lands)

GENERALLY

Lands below the high water mark of navigable waters are not public lands of the United States nor would they become such if title thereto should vest in the United States unless or until Congress extended the public land laws to them.

Authority to Issue Oil and Gas Lease for Land Between the High and Low Water Mark of a Navigable Stream in Louisiana, M-36245 (Dec. 15, 1955)

PUBLIC LANDS--Continued

GENERALLY--Continued

Where an area of land now fast land is alleged to have been an island in existence when the State in which it lies was admitted to the Union, the land is shown upon an United States Army Corps of Engineers Chart as a low island but on the plat of survey approved more than 5 years later as a sandbar, and there is no independent evidence that the alleged island remained an island in the interval, the alleged island and its accretions will not be claimed as public land.

Ralph L. Bassett, Edwin J. Keyser, A-27372 (May 20, 1957)

It is proper to reject an oil and gas lease offer for accreted lands formed between the date of survey of the adjoining lot and the date of entry thereof where the United States patented the adjoining lot without an oil and gas reservation, the United States has filed a declaration of taking for the accreted area, and the United States has not appealed from a holding by the United States district court that title to such accretions, though substantial in amount, passed with the patent.

Edwin J. Keyser, A-27471 (May 20, 1957)

Lands which have been appropriated or reserved for a lawful purpose are not public, and are impliedly excepted from subsequent laws, grants, and disposals which do not specially disclose a purpose to include them.

Leasing of Property Along the Intracoastal Canal in T. 15 S., Rs. 1 and 2 E., La. Mer., Louisiana, M-36462 (Aug. 14, 1957) 64 I. D. 327

Where land was patented to the Santo Domingo Pueblo in 1864 after confirmation of the Santo Domingo claim thereto based on a Spanish grant, the failure of the Pueblo Lands Board to include the land within the exterior boundaries of the Santo Domingo Pueblo grant, which boundaries the Board was required to identify and determine under the act of June 7, 1924, does not amount to a determination that the land is public land.

Nelson D. Jay, A-27468 (Dec. 4, 1957)

The Soldiers' and Sailors' Civil Relief Act of October 17, 1940, cannot be construed to apply to persons who initiated or acquired any interest in the public domain while already a member of the military service, and a lessee

PUBLIC LANDS--Continued

GENERALLY--Continued

under the Small Tract Act who was a member of the military service at the time his lease was issued cannot secure any relief from the requirements of his lease on the basis of that act.

Russell L. Coe, A-27527 (Jan. 24, 1958)

The fact that a lesser estate, the surface, has been carved out of the land and disposed of does not make that which is left, the mineral estate, any the less lands.

Availability for Leasing of Certain Lands on the Jicarilla Apache Indian Reservation, M-36507 (Mar. 14, 1958) (Memorandum from Regional Solicitor, Denver, Colorado, to State Supervisor, Bureau of Land Management, Santa Fe, New Mexico.)

Where all the oil and gas lease offerors are maintaining both public domain and acquired lands offers for the same tracts of land, where no one of them is insisting that a lease must be issued only under one type of offer to the exclusion of the other but each is willing to accept either type of lease, where the Director in a carefully considered opinion found the lands to be leasable only as public domain, and where there is no obvious error in the Director's determination, there is no necessity to disturb the Director's determination.

Henry S. Morgan et al., A-27529 (Aug. 27, 1958) 65 I. D. 369

Indian occupancy of public lands is entitled to be protected against adverse disposition of the lands, whether or not the Indian occupants are privileged to obtain title to the lands occupied and regardless of whether such lands are mineral or non-mineral.

Availability of Lands for Oil and Gas Leasing--Boundaries of the Fort Peck Indian Reservation, M-36539 (Nov. 19, 1958)

Islands which were stable lands in the Snake River when Idaho was admitted to the Union did not pass to the State but remained public lands subject to disposition under the public land laws.

Willis W. Ritter et al., A-27755 (Dec. 22, 1958)

PUBLIC LANDS--Continued

GENERALLY--Continued

The Mineral Leasing Act of 1920 (30 U. S. C. 181, et seq.) normally applies to ceded Indian lands where the cession is absolute.

Originally ceded lands as to which the United States has never parted with title cannot be considered to be "acquired lands" within the meaning of the Mineral Leasing Act for Acquired Lands.

Leasability of Ceded Lands Used by the United States for the Benefit of the Indians, M-36540 (Jan 8, 1959)

CLASSIFICATION

In exercising the discretionary authority vested in him by section 7 of the Taylor Grazing Act, as amended, the Secretary may properly consider and weigh all factors which have a bearing on the suitability of the land for use or disposal, including the effect on the public interest.

As a general rule, the first application filed for the classification of land under section 7 of the Taylor Grazing Act, as amended, is entitled to prior consideration over subsequent applications for the same land.

State selections are to be preferred over conflicting private applications for the same land, even though the State application may have been filed subsequent to the private application. However, in order to merit preferential consideration, the State must be diligent in exercising its selection rights.

The fact that land may be suitable for disposition under the first application filed therefor does not require the land to be classified for such disposition if the land is more suitable for other disposition.

Nelson A. Gerttula, A-27325 (June 20, 1957) 64 I. D. 225

Good administrative practice requires that when land is classified for disposal in a manner which precludes the allowance of applications for the land previously filed those applications be rejected immediately and sufficient time be permitted to elapse to allow the applicants to take appeals from the adverse classification before action is taken by the local office which will result in rights attaching to the classified land under later applications.

PUBLIC LANDS--Continued

CLASSIFICATION--Continued

Although the Department has recently announced that State selections should generally, as a matter of principle, be honored over competing private applications for the same lands, a decision rejecting a prior State selection in favor of later small tract applications will be affirmed where it is shown that, when the land was classified, the prior State selection was considered along with the applications for small tracts and it was determined that the land was more suitable for small tract disposition than for State selection, and where leases have already been issued on the land selected by the State.

State of California et al., A-27507 (Dec. 13, 1957) 64 I. D. 459

State selections are normally to be preferred over conflicting private applications for the same lands, even though the State application may have been filed subsequent to the private application. However, in order to merit preferential consideration, the State must be diligent in exercising its selection rights.

Where a State selection application is filed 8 months after the filing of a public sale application for the same land, it is concluded that the State acted with reasonable diligence to exercise its selection rights so as to merit preferential consideration of its application over the private public sale applicant.

George E. Fahey, A-27606 (Nov. 4, 1958)

State selections are to be preferred over conflicting private applications for the same land even though the State application may have been filed subsequent to the private application. However, in order to merit preferential consideration, the State must be diligent in exercising its selection right.

Where State selections are filed within 6 months after the filing of a private exchange application for the same land, and the private exchange applicants have no special equities to be considered, it is concluded that the State acted with reasonable diligence so as to merit preferential consideration of its selections.

Gerald Kolterman, Evelyn Kolterman, A-27735 (Nov. 20, 1958)

PUBLIC LANDS--Continued

CLASSIFICATION--Continued

Where a tract of public land is valuable for timber management and the State has a major timber management program covering the area, the land is not of the character which should be classified under the Taylor Grazing Act as proper for disposal in satisfaction of individual lieu selection rights.

Jack E. Carl, Greta Elwert, A-27870, A-27900 (Apr. 23, 1959)

Where a tract of land is valuable for the production of timber and is a part of a sustained yield management program, the land is not of the character which should be classified under the Taylor Grazing Act as proper for disposal in satisfaction of individual lieu selection rights.

Donald R. Wheeler et al., A-27927 (Jun. 15, 1959)

In determining whether to dispose of public lands which have been withdrawn by Executive Order 6910, the Department must, pursuant to section 7 of the Taylor Grazing Act, determine both that the lands are of the type subject to disposition under the Soldiers' Additional Homestead Act and that, if they are, their disposition would be in the public interest.

Ferris F. Boothe, A-28058 (Nov. 23, 1959) 66 I. D. 395

Applications for a grazing lease on and the public sale of a tract of land which has been classified as suitable for homestead entry are properly rejected in the absence of positive evidence that the classification is incorrect, or that allowance of the homestead entry would be against the public interest.

Otto L. Dean, A-28045 (Dec. 1, 1959)

DISPOSALS OF

Public lands that were withdrawn and permanently reserved pursuant to act of Congress for schools, hospitals, and other purposes necessary for administration of affairs of Natives of Alaska may either be sold under the

PUBLIC LANDS--Continued

DISPOSALS OF--Continued

provisions of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377, 40 U.S.C. 471 et seq.), or restored to the public domain for disposition under the public land laws.

Authority to Revoke a Permanent Reservation Made Under the Act of May 31, 1938 (52 Stat. 593; 48 U.S.C. 353a), M-36248 (Jan. 17, 1955)

Where lands for which applications are filed under the Pittman Act lie in the same area as lands in which underground water in sufficient quantities for successful irrigation at a reasonable cost has already been discovered, and there is no reason to believe that this source of water does not underlie the lands applied for, and where the lands applied for are not suitable for cultivation, it is proper to reject the applications.

Clarke A. Beckel, S. M. Franklin, A-27178 (Nov. 9, 1955)

Where the land embraced in a Pittman Act underground water permit application is unsuitable for agricultural development because of shallow soil, the topography of the land, or other factors, the application is properly rejected.

Robert J. Aikins, A-27204 (Nov. 9, 1955)

There is nothing in the act of June 4, 1954 (68 Stat. 173, 43 U.S.C. sec. 869 et seq.), which requires that the public be admitted free in connection with any recreational facility developed as a result of a sale or lease to a nonprofit corporation; and an application may be allowed where there will be a benefit to the general public, rather than a limited and exclusive recreational use such as would result from access by "members only."

Recreation Act of June 4, 1954 (43 U.S.C. sec. 869), M-36336 (Jan. 25, 1956) (Memorandum from Field Solicitor, Santa Fe, New Mexico, to State Supervisor, Bureau of Land Management, Santa Fe.)

Only a State executive department or agency capable of holding title to land in its own name is entitled to consideration as a "State instrumentality."

PUBLIC LANDS--Continued

DISPOSALS OF--Continued

A State, its executive departments and agencies, may only collectively receive 640 acres of land per calendar year under the Recreation Act, as amended (43 U.S.C. sec. 869 et seq.), unless a department or agency can qualify as a "state instrumentality" under the amended act, supra, permitting it to receive a separate 640 acres.

640-Acre Limitation in the Recreation Act, as Amended (43 U.S.C. sec. 869 et seq.), M-36357 (July 16, 1956)

The sale of public land to a municipality for leasing to private companies for the purpose of constructing and maintaining private industrial plants thereon, is not a disposal for a "public purpose" within the meaning and intent of the Recreation and Public Purposes Act of 1954 (43 U.S.C., Supp. III, secs. 869 to 869-3) and is not permissible under that act.

Interpretation of "Public Purposes" Under the Recreation and Public Purposes Act of 1954 (43 U.S.C., Supp. III, Secs. 869 to 869-3), M-36390 (Nov. 20, 1956)

Where a legal subdivision has been withdrawn as oil shale land and only part of the subdivision is determined to be oil shale land, the remainder of the subdivision will not be restored from the withdrawal in view of the established practice not to dispose of public lands in less than smallest legal subdivisions.

Rea L. Eaton, A-27377 (Mar. 18, 1957)

Public land which has been withdrawn by Executive Order No. 6964 may not be disposed of until it has been classified, pursuant to section 7 of the Taylor Grazing Act, as amended, as suitable for such disposition.

Nelson A. Gerttula, A-27325 (June 20, 1957) 64 I. D. 225

Under Public Law 522, 84th Congress, 2d Session (70 Stat. 156), providing for the conveyance of certain lands to the City of Henderson, Nevada, after the Secretary has notified the City of the purchase price, the City may apply for and receive a patent to part of the lands thereby waiving or relinquishing its rights to acquire the remainder, but it cannot apply for and receive a patent to part of the lands and suspend its rights to acquire the remainder.

PUBLIC LANDS--Continued

DISPOSALS OF--Continued

If the City of Henderson, Nevada, waived its rights to certain lands under Public Law 522, 84th Congress, 2d session (70 Stat. 156), it could "apply for and receive lease or patent to such lands under the Recreation and Public Purposes Act" for uses authorized under that act, to the extent of 640 acres in any one calendar year.

Public Law 522, 84th Congress, 2d Session (70 Stat. 156), and Application of the Townsite Laws (43 U. S. C. secs. 711-728; 43 CFR 255. 9-255. 54), M-36486 (Oct. 30, 1957)

Public land which has been withdrawn by Executive Order No. 6910 may not be disposed of until it has been classified, pursuant to section 7 of the Taylor Grazing Act, as amended, as suitable for such disposition.

William Lind Hoyt, A-27686 (Oct. 27, 1958)

The Secretary of the Interior may approve a transfer of lands under the Recreation and Public Purposes Act to any party from a patentee under that act, from the patentee's successor, or from a patentee qualified to obtain a conveyance under the act whose patent issued prior to June 4, 1954, under any act, if the acreage patented and transferred to the party under the 1954 act in any 1 calendar year does not total more than 640 acres.

640-Acre Limitation on Transfers Under the Recreation and Public Purposes Act, M-36568 (Jun. 8, 1959)

JURISDICTION OVER

An island which was stable land in the Yellowstone River when Montana became a State did not pass to the State upon its admission to the Union but remained public land subject to disposition under the public land laws.

Northern Pacific Railway Company, Ralph L. Bassett, A-27114 (Oct. 20, 1955)

62 I. D. 401

Although the State has an undoubted right to legislate as she may please in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her

PUBLIC LANDS--Continued

JURISDICTION OVER--Continued

citizens by descent, devise, or alienation, as to public domain of the United States, Congress is invested by the Constitution with the power of disposing of, and making needful rules and regulations respecting it.

Public Law 522, 84th Congress, 2d Session (70 Stat. 156) and Application of the Townsite Laws (43 U. S. C. secs. 711-728; 43 CFR 255. 9-255. 54), M-36486 (Oct. 30, 1957)

A finding in favor of Mexican land grant claimants by the Board of Land Commissioners created by the act of March 3, 1851, to ascertain, adjudicate, and settle private land claims in the State of California, when confirmed by a decree of the district court, is conclusive against the United States and all claiming under them, and the issuance of a patent pursuant thereto deprives the Land Department of further jurisdiction in the matter.

Richard P. Woitke, A-27875 (Apr. 2, 1959)

Where title to land has been confirmed by an act of Congress, this Department has no jurisdiction over the land and no authority to adjudicate claims of individuals to portions thereof.

Floyd A. Wallis et al., A-26944 (Aug. 4, 1959)

LEASES AND PERMITS

The act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 181), is limited in its operations to the public lands of the United States and it only applies to lands to which Congress has extended the public land laws or has specifically extended the act itself.

Authority to Issue Oil and Gas Lease for Land Between the High and Low Water Mark of a Navigable Stream in Louisiana, M-36245 (Dec. 15, 1955)

There is nothing in the act of June 4, 1954 (68 Stat. 173, 43 U.S.C. sec. 869 et seq.), which requires that the public be admitted free in connection with any recreational facility developed as a result of a sale or lease to a

LEASES AND PERMITS--Continued

nonprofit corporation; and an application may be allowed where there will be a benefit to the general public, rather than a limited and exclusive recreational use such as would result from access by "members only."

Recreation Act of June 4, 1954 (43 U.S.C. sec. 869), M-36336 (Jan. 25, 1956) (Memorandum from Field Solicitor, Santa Fe, New Mexico, to State Supervisor, Bureau of Land Management, Santa Fe.)

RIPARIAN RIGHTS

Where the United States has certified to a State, which follows the common law, as school indemnity selections, lots abutting on a meandered nonnavigable lake, the title to the bed of the lake passes to the State.

Grayce R. Hiler, A-27370 (Dec. 19, 1956)

A patent of lots abutting a navigable river does not pass title to an unsurveyed island lying between the lots and the thread of the river.

Willis W. Ritter et al., A-27755 (Dec. 22, 1958)

SPECIAL GRANTS

The allowance of valid desert land entries segregates the lands so entered from the public domain and excludes them from the operation of subsequent laws or grants.

Construction of the Act of May 7, 1954 (68 Stat. 78), Directing Issuance of Patents to the State of Idaho for Certain Carey Act Lands, M-36255 (Jan. 10, 1955)

SPECIAL GRANTS--Continued

A finding in favor of Mexican land grant claimants by the Board of Land Commissioners created by the act of March 3, 1851, to ascertain, adjudicate, and settle private land claims in the State of California, when confirmed by a decree of the district court, is conclusive against the United States and all claiming under them, and the issuance of a patent pursuant thereto deprives the Land Department of further jurisdiction in the matter.

Richard P. Woitke, A-27875 (Apr. 2, 1959)

SPECIAL USE PERMITS

An application for a special land-use permit on vacant, unsurveyed public land must be rejected where the land applied for is not described by metes and bounds as required by regulation.

Auke Bay Hardware and Auto Supply Co., A-27088 (April 11, 1955)

Where an application for a special use permit for land and the improvements on it has been rejected for the reason that it has been determined that the improvements are excess to the needs of the Department and are to be disposed of in accordance with the provisions of the Federal Property and Administrative Services Act, the rejection will not be disturbed in the absence of any showing of error in the rejection.

George Gilbertson et al., A-27456 (July 1, 1957)

Where on appeal to the Secretary of the Interior a desert land applicant requests permission to go onto the land embraced in his application for the purpose of proving the existence of necessary irrigation water, a special use permit may be issued for such purpose at the discretion of the Secretary.

Jack B. Aldridge, Ina D. Aldridge, A-27520, A-27559 (Mar. 12, 1958)

Where, contrary to an area classification report and a field report, some evidence is submitted for desert land applicants that there is a possibility of obtaining sufficient quantities of water to irrigate lands included in their desert land applications, special land use permits may be issued to allow the applicants to go on the land and drill for water in order to show that the land may be properly classified as suitable for desert land entry.

Eric W. Erickson et al., A-27579 (July 3, 1958)

PUBLIC LANDS--Continued

SPECIAL USE PERMITS--Continued

Where rentals under special use permits are based upon a percentage of the total appraised value of the lands involved and the permittees show on appeal that the appraised value is incorrect because of certain factors, the rentals demanded will be recomputed to reflect the correct amount due and payable.

Maidee B. Frank et al., A-27594 (Nov. 17, 1958)

An application for a special use permit to occupy public land as a summer cabin site is properly denied where the land is needed for public recreational purposes.

Daniel J. Fry, A-27773 (Dec. 12, 1958)

An application for a special use permit to maintain a cabin on land withdrawn for a public recreation reserve is properly rejected where the maintenance of the cabin is inconsistent with the purpose for which the land was withdrawn.

Michael A. Molchan, A-27777 (Dec. 12, 1958)

An application for a second extension of a special use permit to occupy public land for the purpose of proving the existence of necessary irrigation water in connection with a desert land application is properly rejected where after 2 years of such occupancy no well has been drilled on the land and the applicant has failed to show that he has a firm commitment, such as a contract, to have a well drilled without delay.

Joseph D. and Violet C. Swenson, A-28028 (Aug. 21, 1959)

Where the lack of a showing as to the existence of sufficient irrigation water is the principal reason preventing allowance of desert-land applications, the applicants will be afforded an opportunity to apply for special use permits to drill wells to prove the existence of sufficient water to irrigate the land applied for.

Ethel E. Becker et al., A-28032 (Oct. 28, 1959)

Where on appeal to the Secretary of the Interior from the rejection of desert land applications because of a lack of a showing as to the existence of sufficient irrigation water, the applicants present evidence tending to show the possibility of the existence of sufficient underground water, special use permits may be

PUBLIC LANDS--Continued

SPECIAL USE PERMITS--Continued

issued for the purpose of drilling wells on the lands provided the applicants' applications meet the requirements of the regulations.

Rockwell A. Davis, Pedro O. Garcia, A-28071, A-28081 (Oct. 28, 1959)

Special use permits for the purpose of drilling wells to show the existence of irrigation water on public lands embraced in a homestead application may be allowed where the lands are suitable for agricultural production if sufficient water for irrigation can be found.

Joseph A. and Joseph Akren, A-28053 (Nov. 20, 1959)

PUBLIC RECORDS

The statements filed semi-annually pursuant to the act of August 2, 1954 (68 Stat. 648, 30 U.S.C. sec. 184 (Supp. III, 1956)), amending section 27 of the Mineral Leasing Act of 1920, by optionees of oil and gas leases or applications are not confidential information but are open for inspection by the general public as a matter of policy because no legal objection barring their inspection by persons other than parties thereto is evidenced by the act or prior policy of the Department. Orderly inspection procedure of the statements filed semi-annually pursuant to the act of August 2, 1954 (68 Stat. 648, 30 U.S.C. sec. 184 (Supp. III, 1956)), can be maintained under current regulations.

Whether or not the Statements Filed Semi-Annually Pursuant to the Act of August 2, 1954 (68 Stat. 648, 30 U.S.C. sec. 184) (Supp. III, 1956), by Optionees of Oil and Gas Leases or Applications may be Inspected, M-36386 (Nov. 13, 1956)

The official grazing files are public records of which the Department takes notice in rendering decisions but the probative value of the files depends upon the contents of the files.

E. L. Cord, DBA El Jiggs Ranch, A-27426 (June 25, 1957) 64 I. D. 232

PUBLIC RECORDS --Continued

Invitations for bids, bids and contractual documents are public records to the extent that they do not involve "trade secret" and "know how" data. Public records are available for inspection in accordance with the procedure set forth in 43 CFR 2.1. Restrictions on the public's right to know how the Department's public business is conducted should be held to a minimum.

Protest of Thomas Works, Delta-Star Electric Division, H. K. Porter Company--Invitation No. 8527--Bonneville Power Administration, M-36487 (Dec. 24, 1957) 64 I. D. 463

PUBLIC SALES

GENERALLY

The existence of a grazing lease will not bar the disposal, in accordance with the general authority of section 7 of the Taylor Grazing Act, of the leased land through public sale as an isolated tract; and the grazing lease may be canceled in order to effect such disposal.

Henry Petz, Mary B. Wilson, Administratrix of the Estate of Frank H. Wilson, A-27017 (Feb. 11, 1955) 62 I. D. 33

Where an application for public sale has been rejected for the reason that the land provides access to a fishing stream for the public and access to the stream for livestock grazing on adjacent public lands and the applicant submits on appeal evidence controverting these points, the case will be remanded to the Bureau of Land Management for reconsideration of the application.

John L. Kemp, A-27048 (Mar. 1, 1955)

One whose bid for land offered at public sale has been declared the highest bid does not, without more, acquire any interest in the land.

Where land offered for public sale is subsequently reported to be prospectively valuable for oil and gas, it may not be disposed of under the public sale law except with a reservation to the United States of the oil and gas deposits in the land.

PUBLIC SALES--Continued

GENERALLY--Continued

No right in land offered at public sale is acquired until the issuance of a cash certificate.

Alexander David Norton, A-27040 (Mar. 7, 1955)

Section 2455, Revised Statutes, as amended (43 U. S. C. sec. 1171), was extended to the Territory of Alaska by section 3 of the act of August 24, 1912 (37 Stat. 512; 48 U. S. C. sec. 23), and now applies to that Territory.

Applicability of Public Sale Act to Alaska, M-36303 (Oct. 10, 1955) 62 I. D. 380

A protest against the appraised price of lands classified for public sale should be rejected where the appraisal is based on the reasonable value of the land plus the appraised value of the timber thereon as determined by approved forestry methods after a field examination of the lands.

Jerry R. Crouse, A-27241 (Dec. 23, 1955)

There is no requirement that an award of land offered at public sale can be made to a preference-right claimant only after a hearing has been held for receiving evidence in support of and in opposition to the preference-right claim.

Howard M. Wilson, The Navajo Tribe, A-27233 (Jan. 23, 1956) 63 I. D. 36

An application for the public sale of land withdrawn by Executive order and reserved for reservoir or irrigation purposes must be rejected, and action on the application will not be suspended to await possible revocation of the withdrawal order as to the land applied for.

Earl L. Livermore, A-27552 (Feb. 7, 1958)

Where land has been classified as suitable for disposition by direct sale under the Small Tract Act, the sale has been held, the purchasers declared, cash certificates issued, and the purchasers have complied with all the requirements of the statute and regulation, a protest against the sale on the ground that the land was improperly classified will be entertained.

State of Wisconsin, Robert F. Hayes, Richard A. Nebel, A-27542 (June 17, 1958) 65 I. D. 265

PUBLIC SALES--Continued

GENERALLY--Continued

The omission of the designation of the range in the description of lands offered for sale as an isolated tract can be regarded as immaterial when all of the bidders correctly identified the offered lands in their bids or proofs of their preference right to purchase and there is no showing that any one interested in the sale was misled by the omission of the range designation.

Redd & Summers, Mabel Marie McComb, Jewell L. Gardner, A-27692 (July 31, 1958)

A protest against the sale of land at public auction is properly dismissed where the assertions in the protest do not affect the validity of the sale or provide a basis for canceling the sale and the record indicates that the land was properly classified for public sale.

Carl G. Allen, Rhoda R. Adamson, A-27865 (Apr. 13, 1959)

The offering of lands at public sale under section 2455 of the Revised Statutes, as amended, which authorizes the sale of certain isolated or rough or mountainous tracts, is properly vacated where the land consists of townsite lots which are subject to sale under the statutory provisions governing the public sale of townsites.

Mrs. Willo M. Chandler, A-27992 (Aug. 4, 1959)

A protest against the public sale of a tract of land, based on the protestant's claim of title to the land derived from a Spanish grant, is properly rejected where the patent issued in confirmation of the grant does not include the particular tract; however, the protestant may be given an opportunity to apply for the tract under the Color of Title Act.

Lamar Louise Curry, A-28023 (Aug. 10, 1959)

A sale of public land at auction will be set aside where the high bidder is the agent of one who is charged, without effective denial, of having attempted prior to the sale to suppress bidding at the sale.

Stanley C. Soho, A-28135 (Aug. 19, 1959)

The mere filing of an application for public sale does not segregate the land from a subsequent filing under another public land law and gives the public sale applicant no rights in the land.

Roscoe T. Schafer, A-28131 (Aug. 27, 1959)

PUBLIC SALES--Continued

GENERALLY--Continued

It is proper to suspend action on an application for public sale of land where that land is included in a prior application filed by a Federal agency for the withdrawal of the land for the use and benefit of that agency.

Arnold B. Runge, A-28067 (Sept. 18, 1959)

APPLICATIONS

A defect in an application for the public sale of an isolated tract does not affect the validity of the sale thereafter held since the filing of an application is not a prerequisite to the holding of the sale.

Henry Petz, Mary B. Wilson, Administratrix of the Estate of Frank H. Wilson, A-27017 (Feb. 11, 1955) 62 I. D. 33

Where it appears from the records of the Department that land embraced in a power site withdrawal created by the President under the act of June 25, 1910, may have been erroneously withdrawn or is without value for power site purposes, and an application for the public sale of such land is filed, a field examination of the land will be ordered to determine if such is the case, and, if so, consideration will be given to a revocation of the withdrawal so as to open the lands for disposal at public sale. If the land is determined to be valuable for a power site, the applicant can seek to have the land restored for disposition pursuant to section 24 of the Federal Power Act, subject to the conditions therein stated.

Weyerhaeuser Timber Company, A-27137 (Aug. 11, 1955) 62 I. D. 305

An application for the public sale of lands embraced in an oil shale withdrawal is properly rejected, and the application cannot be held in suspense until such time as the lands are restored to disposition under the public land laws.

Effie Ellen Cox, A-27175 (Dec. 12, 1955)

PUBLIC SALES--Continued

APPLICATIONS--Continued

As the Secretary may offer a tract of land for sale at public auction on his own motion, the possibility that a sale application may contain an erroneous statement does not affect the validity of the sale or provide a basis for canceling the sale.

Carl G. Allen, Rhoda R. Adamson, A-27865 (Apr. 13, 1959)

It is proper to suspend action on an application for public sale of land where that land is included in a prior application filed by a Federal agency for the withdrawal of the land for the use and benefit of that agency.

Arnold B. Runge, A-28067 (Sept. 18, 1959)

AWARD OF LANDS

Where a tract of land has been awarded to a bidder at a public sale solely for the purpose of giving the bidder a needed outlet to a county road, and it is impossible on the basis of the evidence to determine whether an outlet in fact is needed and whether the award made will give the desired outlet, the case will be remanded for a determination of the facts.

In a division among conflicting preference-right claimants of lands offered at public sale, the land awarded need not be contiguous to the claimant's privately owned land, if the award is otherwise equitable.

George and John Arkoosh, Vivian Bahr, A-26988 (Feb. 25, 1955) 62 I. D. 62

Where two landowners assert preference rights to an isolated tract located on an island, and it is determined that neither party owns land actually adjoining the island, it can be awarded only to the party who was the high bidder at the sale.

Inert Amundson, Peter Evans, A-27078 (Mar. 24, 1955)

An award of land on public sale between two preference right claimants will be reversed where all the land has been included in a grazing lease issued to one claimant and equitable considerations based upon desirable land use, land

PUBLIC SALES--Continued

AWARD OF LANDS--Continued

pattern, fences, and other factors providing for proper utilization of the land require that all of the land be awarded to that claimant.

Arne Hoem, Delia Plaggemeyer, A-27081 (June 23, 1955) 62 I. D. 240

Where only one legal subdivision is offered for sale as an isolated tract and two contiguous landowners assert a preference right to purchase the tract, the tract will not be awarded to the applicant for sale if the award would seriously disrupt a long established land use pattern and violate good range practices.

Albert Hitchens, A-27135 (Aug. 1, 1955)

Where an isolated tract consisting of only one subdivision is offered at public sale and two preference right claimants bid for the tract, it should be awarded to the qualified applicant for the sale where there are no equitable considerations requiring an award to the other claimant.

Harry A. Bradley, Harry V. Petersen, A-27215 (Nov. 22, 1955)

Where an isolated tract consisting of three subdivisions has been divided between two preference right claimants, one subdivision being awarded to one claimant solely for the purpose of giving the claimant a needed passageway from one portion of her privately owned lands to another, and it develops that the claimant has disposed of one portion of the privately owned lands, all the subdivisions will not be awarded to the other claimant where there is no convincing demonstration of such equitable considerations as would require such an award and there is a possibility that the first claimant may still have some need for the subdivision awarded to her, but the case will be remanded for a determination of the facts respecting the claims of both parties.

Ray Underwood, Mary A. Brice, A-27223 (Nov. 23, 1955)

Where neither of two persons who submitted written bids for land offered at public sale has a preference right to purchase several of the offered tracts, and where the conflicting bids are identical in amount, an award of the tracts to the person whose bid was first received is required by departmental regulation.

Capital Livestock Company, James Bompart, A-27288 (Dec. 27, 1955) 62 I. D. 473

PUBLIC SALES--Continued

AWARD OF LANDS--Continued

Where only one subdivision of land is offered at a public sale and it adjoins the lands of two preference right claimants, the tract will be awarded to the applicant for the sale where it appears that there are no equitable considerations to justify making an award to the other preference right claimant.

Charles H. Tomlin, A-27134 (Mar. 26, 1956)

Where in an appeal to the Secretary from a division of lands offered at public sale between two preference right claimants, the appellant alleges that he has a water right on one subdivision awarded to the conflicting preference right claimant, but does not submit any evidence to support his alleged water right although the existence of such a right would present a justifiable basis for changing the award, the award will not be changed.

Where a tract of public land offered for public sale is divided between two preference right claimants in a fair and equitable manner, the mere fact that there is a small difference in the appraised value per acre of the land awarded to one claimant does not provide a substantial basis for changing the award where such claimant is awarded a larger acreage of land.

M. L. Oldroyd, Merle and Zelda K. McPherson, A-27315 (July 5, 1956)

Where only one legal subdivision is offered for sale upon the application of a preference right claimant and another adjoining landowner, who has held a grazing lease on the land, also asserts a preference right to purchase the land, the fact that the latter has used the land as a passageway for his stock and to reach water is not a sufficient "equitable consideration" to require an award to him rather than to the applicant for the sale where it appears that in order to reach the land offered at sale it is necessary for him to cross private land owned by the applicant for the sale and that the watering place for his stock is located on the private land of the applicant for the sale.

George F. Storman, A-27139 (July 25, 1956)

Where a tract of land has been awarded to a bidder at a public sale solely for the purpose of giving the bidder a needed outlet to a county road, and it is determined after a supplemental field examination that an outlet exists through a lease of land made by the bidder and that in

PUBLIC SALES--Continued

AWARD OF LANDS--Continued

any event the award would not give the desired outlet or is not necessary for that purpose, the award will be vacated as to that tract of land.

George and John Arkoosh, Vivian Bahr, A-26988 (Supp.) (Aug. 14, 1956)

Where a single subdivision of public land is offered for public sale on the Government's own motion, and two or more adjoining landowners assert preference rights to purchase the land offered, an award should be made after a determination of each party's relative need for the land, considering such factors as historic use, land pattern, etc., and the award should not be made simply to the first person asserting his preference right to purchase.

Where two or more preference right claimants assert a preference right to purchase a single subdivision of public land offered for public sale, and the record does not contain sufficient evidence concerning the relative needs of the parties for the land offered, the case will be remanded to the Bureau of Land Management for further consideration and a field examination, if necessary.

James A. Neal, Guy B. and Wilda J. Seibert, A-27309 (Aug. 15, 1956) 63 I. D. 266

Where only one subdivision of land is offered at public sale on the Government's own motion, the land adjoins the lands of two preference-right claimants, and it is determined that an award of the tract to one preference-right claimant will result in a more desirable land pattern, the award will not be disturbed in the absence of a clear showing that the award fails to consider a material fact, or is otherwise erroneous.

Guy B. and Wilda J. Seibert, James A. Neal, A-27524 (Dec. 12, 1957)

Where in an appeal to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, awarding lands offered at public sale, a preference-right claimant presents evidence tending to show that the basis for making the award may have been in error, and the record is not conclusive on the points raised, the case will be remanded to the Bureau for further field examination and reconsideration.

Bernice Esther Edstrom et al., A-27530 (Jan. 23, 1958)

PUBLIC SALES--Continued

AWARD OF LANDS--Continued

An award of lands offered at public sale between two preference-right claimants will not be disturbed where the appellants fail to present convincing evidence that the award was unfair or based upon material error, and the award appears to have been properly made upon the basis of topography of the lands, desirable land pattern, and historical use of the lands.

Ormand L. and Myrtle A. Hurt, A-27544 (Feb. 14, 1958)

Where two persons owning land adjoining two or more subdivisions of a tract of land offered at public sale assert preference-right claims to purchase the tract, it is improper to award one of the subdivisions to each claimant solely on the basis of the fact that each owns land adjoining one subdivision without first determining the relative needs of the claimants for the land and factors of historical use, desirable land pattern, etc.

Joseph H. Greenhalgh, Charles O. Miller, A-27561 (May 6, 1958)

Where only one subdivision of land is offered at public sale and it adjoins the lands of two preference-right claimants, the tract will be awarded to the applicant for the sale where it appears that there are no equitable considerations to justify an award to the other preference-right claimant.

George W. Altfillsch, A-27562 (May 6, 1958)

In the absence of acceptable evidence to support the preference right asserted by two competing bidders, an award of the land to the highest bidder is required by departmental regulations.

An owner of lands contiguous to land offered at public sale who fails to submit satisfactory evidence of his ownership of such lands within 30 days after the highest bid has been received loses his preference right to purchase the land.

Don C. Shafer, Thomas A. Miller, A-27645 (Sept. 15, 1958)

The rule that land will not be disposed of in less than the smallest legal subdivision is a rule of administrative convenience, and an award of less than a legal subdivision may be made where the particular circumstances warrant such action.

Charles O. Miller, Joseph H. Greenhalgh, A-27822 (Mar. 4, 1959)

PUBLIC SALES--Continued

AWARD OF LANDS--Continued

An award of lands offered at public sale between two preference-right claimants will not be disturbed where the appellant fails to present convincing evidence that the award was unfair or based upon material error, and the award appears to have been properly made.

Mendell P. Schneider, A-27891 (Apr. 23, 1959)

In the absence of acceptable evidence to support a preference-right claim to land offered at public sale, the land must be awarded to the highest bidder.

Elizabeth A. Tallon, Oscar Jones, A-27910 (May 18, 1959)

An award of lands offered at public sale between three preference-right claimants of one legal subdivision to each claimant will not be disturbed where the appellants fail to present convincing evidence that the award was unfair or based upon material error, and the award appears to have been properly made on the basis of equalizing the number of acres awarded each preference-right claimant, the topography of the lands, desirable land pattern, and historical use of the lands.

Henry W. and Beatrice H. Luhmann, A-27941 (Supp.) (Jun. 15, 1959)

An award of lands offered at public sale between two preference-right bidders will not be disturbed in the absence of convincing evidence that the award works an undue hardship on the protestant, conflicts with historic use, or creates an undesirable land pattern.

Hilburn Wolf Reed, A-27951 (Jul. 27, 1959)

Where acceptable evidence of ownership of land contiguous to a tract offered at public sale is not submitted by preference-right claimants within 30 days after the sale, the land is properly awarded to the highest bidder at the sale.

Lawrence V. Lindbloom, A-27993 (Aug. 4, 1959)

The general rule is that where a single subdivision is offered for public sale and two or more adjoining landowners assert a preference right to purchase, if the applicant for the sale is not a preference-right claimant the award will be made to the first person asserting a preference right in the absence of equitable considerations justifying an award to some other preference-right claimant.

PUBLIC SALES--Continued

AWARD OF LANDS--Continued

An award of a single subdivision of public land offered at public sale to the first person asserting a preference right to purchase will not be disturbed where the applicant for the sale is not a preference-right claimant and there are no equitable considerations requiring an award to any other preference-right claimant.

Ervin Carl and Sadie V. Lembke, A-28015 (Supp.) (Oct. 5, 1959) 66 I. D. 345

When the preference-right claimants are unable to agree upon a division of land offered for public sale and one is unwilling to accept the division made by the manager and there is conflict in the record as to basic factors which determine the utility of the land to the claimants, a new field examination will be ordered.

Flora E. Gray, A-28002 (Oct. 19, 1959)

Where tracts of land sold at public sale have been patented pending an appeal by an unsuccessful bidder for the land, this Department has lost jurisdiction over the land and will not recommend institution of action to cancel the patents where the unsuccessful bidder does not request such action and no factor of public interest requires it.

In the absence of acceptable evidence to support a preference-right claim to land offered at public sale, the land must be awarded to the highest bidder.

Charles Kik et al., A-27872 (Dec. 1, 1959)

BIDDING

Requirement in a notice of public sale for oil and gas mining leases on Indian lands that sealed bids be submitted by a definite time must be observed and where a bid covering eight tracts was submitted after other timely bids on two of the tracts had been opened and the sale closed the late bid for the two tracts cannot be considered. Only the timely bids are acceptable under the public sale or steps may be taken in accordance with other provisions of the sale to reject all bids for the two tracts and readvertise those tracts at another public sale. Bids received late for the public sale on six tracts

PUBLIC SALES--Continued

BIDDING--Continued

regarding which no competing bids had been received may be regarded as offers to purchase at a private or negotiated sale.

Plymouth Oil Company, IA-453 (July 15, 1955) 62 I. D. 262

A bid for some of the legal subdivisions of land included in an offering of an isolated tract is properly rejected where the notice of sale required that bids be submitted for the offered lands in their entirety.

Redd & Summers, Mabel Marie McComb, Jewell L. Gardner, A-27692 (July 31, 1958)

A bid for some of the legal subdivisions of land included in an offering of an isolated tract is properly rejected when the notice of sale requires that bids be submitted for the tract in its entirety.

Carl J. Richardson, A-28078 (Jun. 25, 1959)

A sale of public land at auction will be set aside where the high bidder is the agent of one who is charged, without effective denial, of having attempted prior to the sale to suppress bidding at the sale.

Stanley C. Soho, A-28135 (Aug. 19, 1959)

CLASSIFICATION

A protest by a grazing lessee against the public sale of land included in his lease is properly dismissed where it does not appear that the sale will seriously disrupt the grazing operations of the lessee or subject him to undue hardship, since he may exercise his preference right as an owner of adjoining land to purchase part of the lands to be offered at the sale.

Louis R. Masek, A-27027 (Feb. 9, 1955)

Where an isolated area of public land comprising approximately 37 acres is suitable for disposition in its entirety as an isolated tract or possibly as several small tracts, it is in the public interest to dispose of it as an isolated tract where there is no assurance that the entire

area could be disposed of at once as small tracts and where small tract disposition would require a further survey of the land.

James J. Kendrew, A-27145 (April 8, 1955)

An application for the public sale of land will be rejected where the land is chiefly valuable for timber reproduction and should be retained in Federal ownership for administration as part of a sustained-yield program.

Jacob L. Hanseth, A-27156 (July 27, 1955)

Where a protest is filed against the public sale of an isolated tract and thereafter the protestant files an application which conflicts with the public sale, and the record raises a question as to the propriety of the classification of the land as suitable for disposal at public sale but there is insufficient evidence in the record to determine the controversy, it is proper to remand the case for reconsideration of the classification of the land in view of the conflicting application.

R. W. Richmond, A-27194 (Aug. 4, 1955)

A public sale application is properly rejected where the application was filed some 4 years after an application for the same land filed by a State under the Recreation Act of 1926, as amended, and where the land is found to be chiefly valuable for recreational purposes.

Edwin Nivenski, A-27180 (Nov. 14, 1955)

Where a tract of public land proposed for public sale is surrounded on three sides by other public land under grazing permits or licenses, and disposal of the land would result necessarily in a readjustment of the grazing permits or licenses, complicating the land pattern and range use and administration and adversely affecting the livestock operations of the permittees or licensees, it is proper to reject the application.

Helen Rinehart, A-27210 (Nov. 22, 1955)

A public sale application for an isolated tract of public land will be rejected where the land is highly valuable for recreational purposes and affords the general public access to the San Juan National Forest.

Lafayette M. Hughes, A-27213 (Dec. 28, 1955)

An application for public sale is properly rejected where disposal of the land applied for to private ownership would result in blocking a stock driveway and would unreasonably interfere with livestock operations.

Orie W. Robison, A-27609 (July 22, 1958)

A protest against a public sale on the ground that it will deprive the protestants of a long-established livestock trail is properly dismissed where the lands are suitable for disposition by public sale and the protestants fail to sustain their protest with any convincing evidence.

Howard Williams et al., B. H. Stringham, A-27500 (July 22, 1958)

Where land has been classified for disposition under the Small Tract Act and the record indicates that it is chiefly valuable therefor, a public sale application for the land is properly rejected.

Paul B. and Ruth M. Butler, A-27634 (Aug. 26, 1958)

A public sale application is properly rejected where the land applied for has been classified as suitable for wildlife purposes and is required for retention in public ownership for wildlife use in furtherance of a land acquisition project by a State fish and game department.

Randall Storey, A-27573 (Sept. 22, 1958)

An 80-acre tract of public land surrounded on three sides by privately owned land of a public sale applicant and inaccessible on the other because of altitude, which can be disposed of as one isolated tract or a number of small tracts, is properly classified as suitable for disposal at public auction in a single tract at the request of the owner of the surrounding land because of the lack of public access.

Albert F. Bolz, Lionel John Benner et al., A-27804 (Feb. 3, 1959)

PUBLIC SALES--Continued

CLASSIFICATION--Continued

A half section of rough, mountainous, public land entirely surrounded by privately-owned land, which can be disposed of as one isolated tract and which contains only one 5-acre tract possibly suitable for disposal as a small tract, is properly classified as suitable for disposal in its entirety by public sale.

Regina G. Owen, A-27916 (May 19, 1959)

A portion of a grazing permit is properly canceled when it appears that the land is suitable for disposition by public sale and partial cancellation of the permit will not unduly interfere with the permittee's livestock operations.

Herbert C. Rose, A-27917 (Jul. 22, 1959)

An isolated tract of public land is properly classified as suitable for disposal by public sale where sale of the land will not seriously affect grazing operations being conducted on the land under a grazing lease.

Jewel H. England, Stanley C. Soho, A-27978 (Aug. 17, 1959)

A public sale application is properly rejected where the land applied for has been classified as valuable for recreation purposes, and suitable for lease or sale under the Recreation and Public Purposes Act of June 14, 1926, as amended.

Roscoe T. Schafer, A-28131 (Aug. 27, 1959)

An isolated tract of public land is properly classified as suitable for disposal by public sale when sale of the land will not seriously interfere with grazing operations being conducted on the land under a grazing lease.

James P. Winslow, A-28115 (Dec. 22, 1959)

ISOLATED TRACTS

An application for the public sale of land as an isolated tract must be rejected where the land is not completely surrounded by lands held in non-Federal ownership.

Edwin Nivenski, A-27180 (Nov. 14, 1955)

PUBLIC SALES--Continued

ISOLATED TRACTS--Continued

Where a tract of land offered for public sale as an isolated tract is determined to be prospectively valuable for uranium, the manager may determine that the land should not be sold even though a bidder has been declared purchaser since the pertinent regulation gives the manager authority to make such a determination at any time up to the issuance of the cash certificate.

Lands valuable for uranium are not subject to public sale as isolated tracts.

Buck Willcoxson, A-27402, A-27403 (Dec. 17, 1956)

Lands valuable for uranium are not subject to public sale as isolated tracts.

Roscoe T. Schafer, A-28131 (Aug. 27, 1959)

PREFERENCE RIGHTS

A person has no preference right in connection with a public sale of an isolated tract merely because he holds a grazing lease on the tract to be sold.

One who owns land merely touching the corner of an isolated tract is not entitled to the preference granted by the first proviso of section 2455 of the Revised Statutes, as amended, to the owners of land contiguous to the isolated tract offered.

Henry Petz, Mary B. Wilson, Administratrix of the Estate of Frank H. Wilson, A-27017 (Feb. 11, 1955) 62 I. D. 33

Where preference right claims are asserted for two tracts of land offered at public sale by a father on behalf of his daughter, who was the applicant for the sale and who asserted in her application that she owned land contiguous to one of the tracts, the preference right claims are properly disallowed where it appears that such contiguous land is owned by a family corporation and that the only land contiguous to the other tract is owned by the father in his own name.

Herma Werner Irvine, A-27031 (Feb. 15, 1955) 62 I. D. 38

PUBLIC SALES--Continued

PREFERENCE RIGHTS--Continued

A person who owns land adjoining a single subdivision of a tract consisting of two or more contiguous subdivisions is an owner of land contiguous to the entire tract within the meaning of section 2455, Revised Statutes, granting owners of contiguous land a preference right to purchase isolated tracts offered for public sale, notwithstanding that his land does not adjoin any of the other subdivisions within the tract.

George and John Arkoosh, Vivian Bahr, A-26988 (Feb. 25, 1955) 62 I. D. 62

Where the owner of contiguous land submits a timely preference-right claim for lands offered at public sale on the last day of the preference-right period and tenders his personal check which is later dishonored, the preference-right claim should be rejected.

John W. Roundy et al., A-27127 (Mar. 28, 1955) 62 I. D. 116

Where a person asserting a preference right to purchase land offered for sale as an isolated tract fails to accompany his claim with the purchase price of the land within the 30-day period after the highest bid has been received, he loses his right to assert his preference right.

Sam Henry Bober & Sons, Inc., A-27141 (June 21, 1955)

One who shows that he is the owner of a fee simple title to land contiguous to land offered at public sale is a preference-right claimant within the meaning of the public sale law and the regulations thereunder although the minerals in his land are reserved to his grantor.

Where the United States acquires title to land in trust for an Indian tribe, the tribe is the beneficial owner of the land and such ownership is sufficient to entitle it to assert a preference right claim to purchase adjoining public land which is offered for sale.

Where an Indian tribe asserts a preference right to purchase land offered at public sale, evidence contained in the files of the Department showing ownership of contiguous land to be in the tribe may properly be considered in determining the validity of the asserted claim.

Howard M. Wilson, The Navajo Tribe, A-27233 (Jan. 23, 1956) 63 I. D. 36

PUBLIC SALES--Continued

PREFERENCE RIGHTS--Continued

One who fails to submit satisfactory evidence of his ownership of contiguous land within 30 days after the date of a public sale loses his preference right to purchase the land.

Fred and Mildred M. Bohen et al., A-27280 (Feb. 17, 1956) 63 I. D. 65

A preference right claimant for land sold at public sale must show that he continued to own contiguous land at the end of the preference period.

Charles H. Tomlin, A-27134 (Mar. 26, 1956)

The purchaser of a tract of public land under the Small Tract Act (43 U. S. C. sec. 682a) is entitled to a preference right to purchase adjoining public lands under the Public Sale Act (43 U. S. C. sec. 1171).

Public Sale Act, M-36356 (July 9, 1956)

The owner of private lands which are near to, but not touching, an island of the United States offered at public sale, is not an owner of contiguous land and therefore not a preference right claimant.

Mrs. M. H. Wildermuth, A-27409 (Jan. 30, 1957)

Where a regulation provides that a preference right to purchase land offered at public sale must consist of either a certificate of the local recorder of deeds or an abstract of title, and a preference right claimant submits only a warranty deed to show transfer of title to him, the preference right must be rejected.

An owner of contiguous lands to land offered at public sale who fails to submit satisfactory evidence of his ownership of such lands within 30 days after the highest bid has been received loses his preference right to purchase the land.

Where a preference right claimant to land offered at public sale fails to submit the proof of ownership of adjoining land required by the Department's regulations, he loses his preference right notwithstanding the fact that he was assured by the manager that the proof of title which he did submit was satisfactory.

William H. Boyd, Clarence Virgil West, A-27440 (June 3, 1957)

PUBLIC SALES--Continued

PREFERENCE RIGHTS--Continued

Where a regulation of the Department requires that proof in support of a preference right to purchase land offered at public sale must be submitted within 30 days from the receipt of the highest bid and specifies what type of proof of ownership must be submitted, a preference-right claimant who does not submit his proof of ownership of adjoining land within the 30-day period and whose proof does not comply with the regulation may not be afforded an opportunity at a later date to submit proper evidence of ownership and his preference right is lost as to the particular sale.

Where a regulation of the Department requires that an asserted preference right to purchase land offered at public sale must be supported by proof of ownership of adjoining land, and specifies that such proof must consist of either an abstract of title or a certificate from the local recorder of deeds showing the claimant to be the owner in fee simple at or after the date of sale, a copy of a deed to the claimant showing simply that title was conveyed to him at some time prior to the date of sale, accompanied by a certificate by the county clerk that it is a correct copy of the original deed, does not comply with requirements of the regulation.

E. E. Larsen, Victor Cleveland, A-27462 (Sept. 17, 1957)

An owner of lands contiguous to land offered at public sale who fails to submit satisfactory evidence of his ownership of such lands within 30 days after the highest bid has been received loses his preference right to purchase the land.

Russel Liston, Hellen M. & E. J. Hutchins, A-27485 (Oct. 21, 1957)

When a regulation requires that an owner of lands contiguous to lands offered at public sale must support his claim to a preference right to purchase by filing either a certificate of the local recorder of deeds or an abstract of title or certificate of title prepared by a title company or an abstracting company showing that he owns adjoining land in fee simple at or after the date of the sale, a statement by an official of the State from whom the claimant has agreed to purchase the land is not sufficient.

An owner of lands contiguous to lands offered at public sale who fails to submit satisfactory evidence of his ownership of such lands within 30 days after the highest bid has been received loses his preference right to purchase the land.

PUBLIC SALES--Continued

PREFERENCE RIGHTS--Continued

The provision of the regulation requiring a preference right claimant to file satisfactory proof of his ownership of adjoining lands during the 30-day period after the highest bid has been received is consistent with the statutory requirement that the preference-right period should consist of not less than 30 days.

Jess R. Manuel, Thomas & Billie Watson, A-27482 (Nov. 29, 1957)

Under the pertinent regulation a document submitted in proof of a preference-right claimant's ownership of adjoining land, proper in all other respects, is not to be rejected merely because it is not labeled a "certificate" or does not contain a statement that it is a certificate.

Under the pertinent regulation proof of ownership of adjoining lands submitted in support of a preference-right claim is acceptable so long as it establishes ownership at or after the date of the sale, within the preference-right period, even though it is dated prior to the date on which the preference-right claim is filed.

A document submitted under the pertinent regulation, as supporting proof of a preference-right claim, which consists only of a statement by a title company that the claimant is the grantee in the last recorded deed conveying adjoining land is insufficient either as an abstract of title or certificate of title to establish ownership in the claimant of such land.

Salvatore Megna, Guardian, Philip T. Garigan, A-27528 (Jan. 20, 1958) 65 I. D. 33

A person who owns land adjoining a single subdivision of a tract consisting of two or more contiguous subdivisions is an owner of land contiguous to the entire tract within the meaning of section 2455, Revised Statutes, granting owner of contiguous land a preference right to purchase isolated land offered for public sale, notwithstanding that his land does not adjoin any of the other subdivisions within the tract.

Joseph H. Greenhalgh, Charles O. Miller, A-27561 (May 6, 1958)

One who owns land merely cornering on land offered at public sale is not entitled to the preference to purchase accorded to owners of contiguous lands.

George W. Altfillsch, A-27562 (May 6, 1958)

PUBLIC SALES --Continued

PREFERENCE RIGHTS--Continued

An owner of lands contiguous to lands offered at public sale who fails to submit satisfactory evidence of his ownership of contiguous lands within 30 days after the highest bid has been received for the lands to be sold loses his preference right to purchase the land.

The requirement of a regulation that a preference-right claimant support his claim by offering proof of his ownership of contiguous lands consisting of a certificate of the local recorder of deeds or an abstract of title or a certificate of title prepared and certified by a title company or an abstracting company within 30 days after receipt of the highest bid on the lands offered for sale is not satisfied by submission of a statement signed by the County Assessor almost 2 months before the bids are received.

Mildred S. Ayers, A-27604 (Aug. 26, 1958)

An owner of lands contiguous to land offered at public sale who fails to submit satisfactory evidence of his ownership of such lands within 30 days after the highest bid has been received loses his preference right to purchase the land.

The requirement of a regulation that the owner of lands contiguous to lands offered for public sale must support his claim to a preference right to purchase by filing either a certificate of the local recorder of deeds or an abstract of title or certificate of title prepared by a title company or an abstracting company showing that he owns adjoining land in fee simple at or after the date of the sale is not met by filing a certificate signed by the county assessor or the county assessor's statement made 6 months before the date of sale.

Don C. Shafer, Thomas A. Miller, A-27645 (Sept. 15, 1958)

Where an award at public sale is made on the basis of the preference right to purchase given to adjoining land owners for a period of 30 days after the high bid is declared, and the high bidder at the sale protests the award on the ground that the preference-right claimant was not the fee simple owner of adjoining land during the preference-right period, and submits prima facie evidence tending to confirm his contention, the case will be remanded to the Bureau of Land Management for further investigation of the high bidder's contention.

Herbert E. Counihan, A-27750 (Dec. 18, 1958)

PUBLIC SALES--Continued

PREFERENCE RIGHTS--Continued

Where the assertion of a preference right to acquire land at public sale is challenged on the ground that the right was asserted by one who had no authority to act for the preference-right claimants and where those claimants, in response to the challenge, state in writing that the action of the party purporting to act in their behalf was at their request and on their behalf, it is proper to award the land to the preference-right claimants.

Mrs. Laura F. Warfield, A-27788 (Jan. 16, 1959)

Where a regulation of the Department requires that proof in support of a preference right to purchase land offered at public sale must be submitted within 30 days from the receipt of the highest bid and specifies what type of proof of ownership must be submitted, a preference-right claimant whose proof does not comply with the regulation may not be afforded an opportunity at a later date to submit proper evidence of ownership and his preference right is lost as to the particular sale.

Where a regulation of the Department requires that an asserted preference right to purchase land must be supported by proof of ownership of contiguous land and specifies that such proof must consist of either an abstract of title or a certificate from the local recorder of deeds showing the claimant to be the owner in fee of the whole title to contiguous land at or after the date of the sale, a statement by the county recorder that contiguous land "is listed in the name of" the preference claimant does not comply with the requirements of the regulation.

Where a preference-right claimant to land offered at public sale submits a document which is not proper proof of ownership of contiguous land as clearly required by the Department's regulation, his failure cannot be excused on the ground that the manager had uniformly accepted such documents as proof of ownership in the past.

Elizabeth A. Tallon, Oscar Jones, A-27910 (May 18, 1959)

A certificate by an abstract company that there has been recorded a warranty deed purporting to run from named grantors to a named grantee and purporting to convey certain land is insufficient to constitute the certificate of title required by regulation to support a preference-right claim by the grantee to purchase land offered at public sale.

Lawrence V. Lindbloom, A-27993 (Aug. 4, 1959)

PUBLIC SALES--Continued

PREFERENCE RIGHTS--Continued

The highest bidder at a public sale who fails to submit satisfactory evidence of his ownership of contiguous lands within 30 days after the highest bid has been received loses his preference right and the land is properly awarded to a preference-right claimant who matches the highest bid.

Vernon Russell Allred, A-28083 (Nov. 19, 1959)

Where a regulation of the Department requires that proof in support of a preference right to purchase land offered at public sale must be submitted within 30 days from the receipt of the highest bid and specifies what type of proof of ownership must be submitted, a preference-right claimant whose proof does not comply with the regulation may not be afforded an opportunity at a later date to submit proper evidence of ownership and his preference right is lost as to the particular sale.

Charles Kik et al., A-27872 (Dec. 1, 1959)

ROUGH OR MOUNTAINOUS TRACTS

An application for the public sale of land as mountainous or too rough for cultivation is properly rejected where the greater part of each legal subdivision adjoining the applicant's land is gently sloping land which could be cultivated if irrigated.

Albert N. Froom, A-27124 (May 23, 1955)

An application for the public sale of a tract of public domain, the greater part of which is mountainous or too rough for cultivation, will be rejected where the disposition of the tract would disrupt the allotment of the Federal range in the area and cause a dislocation of the use pattern in the area.

Mike Erramouspe, Albert Erramouspe, A-27179 (Sept. 27, 1955)

An application for the public sale of land as mountainous or too rough for cultivation must be rejected where the applicant is not the owner of contiguous lands.

Edwin Nivenski, A-27180 (Nov. 14, 1955)

PUBLIC SALES--Continued

ROUGH OR MOUNTAINOUS TRACTS--Continued

Under the public sale law and regulations a tract of land can be offered at public sale as mountainous or too rough for cultivation only upon the application of one who owns or has a valid entry on adjoining land.

Sidney Smith, A-27249 (Mar. 12, 1956)

The holder of a small tract lease with option to purchase or the patentee of a tract of public land under the Small Tract Act (43 U.S.C. sec. 682a) or his successor may apply for the sale of a rough and mountainous tract under the second proviso of the Public Sale Act (43 U.S.C. sec. 1171).

Public Sale Act, M-36356 (July 9, 1956)

Where under the public sale law and regulations a tract of land can be offered at public sale as mountainous or too rough for cultivation only upon the application of one who owns or has a valid entry on adjoining land, and after the date of the sale it is determined that the evidence of ownership of adjoining land submitted by the applicant for the sale is not sufficient to show ownership of adjoining land at the time his application was filed, it is proper to allow the applicant a reasonable period of time to submit the proper proof of title.

E. E. Larsen, Victor Cleveland, A-27462 (Sept. 17, 1957)

An application for the public sale of a tract of public land, the greater part of which is mountainous or too rough for cultivation, will be rejected when disposition of the tract would aggravate the range deficiencies in a grazing unit already over-allotted.

Willard L. Smith, A-28077 (Oct. 19, 1959)

Where an application is filed for public sale of public land comprising two 40-acre tracts as rough or mountainous, the character of each tract is to be considered separately and not the character of the unit of 80 acres as a whole, and it is improper to reject the application in its entirety on the ground that the greater portion of the 80 acres is not rough or mountainous when in fact the greater portion of one 40-acre subdivision is rough and mountainous.

Marie H. Caldwell, A-28101 (Dec. 1, 1959)

PUBLIC SALES--Continued

SALES UNDER SPECIAL STATUTES

The Department is not authorized to issue patents under the Alaska Public Sale Act to holders of certificates of purchase who do not submit any proof as to use of the land or applications for patent until more than 5 months after the period required by statute.

The Alaska Public Sale Act and the departmental regulations and certificates of purchase issued under the act require that proof of use of the land for the purpose for which it was classified for sale be submitted within 3 years after issuance of a certificate of purchase, and the Department has no authority to modify the statutory provision that the required proof be submitted within the 3-year period.

Matanuska Valley Lines, Inc., et al., A-27197 (June 23, 1955) 62 I. D. 243

The Department has no authority to extend beyond 3 years the period for which certificates of purchase under the Alaska Public Sale Act are issued.

Martha Lee Starns, Administratrix, Estate of Laurence S. Starns, Deceased, A-27185 (June 23, 1955)

An application to purchase an island under the Recreation Act of June 14, 1926, as amended, which is withdrawn for marine navigational aid and is being administered by the United States Coast Guard, is properly rejected where the Coast Guard refuses to consent to the sale of the land because disposal of the land for recreational purposes would interfere with the purpose for which the island was withdrawn and the consent of the agency is required by the statute before the land can be disposed of.

City of Wyandotte, Michigan, A-27494 (Oct. 30, 1957)

A protest against an application by a municipality for the sale to it, pursuant to the Recreation and Public Purpose Act, as amended, of public land for use as a garbage dump site is properly dismissed where the land is suitable for the purpose and the protestants offer objections which are concerned with interests of others who have themselves not objected or are matters which must be determined by local governmental bodies.

H. S. Chisholm et al., City of Reno, A-27643 (Apr. 3, 1958)

PUBLIC SALES--Continued

SALES UNDER SPECIAL STATUTES--Continued

In proceedings under Private Law 654 (84th Cong., 2d sess.), purchasers of land under the Alaska Public Sale Act who have paid the full purchase price for the land and who assert that they have performed the requirements for receiving patents on the land will be granted a hearing on the question whether they have complied with those requirements.

Matanuska Valley Lines, Inc., et al., A-27545 (May 12, 1958) 65 I. D. 214

RAILROAD GRANT LANDS

The clauses purporting to exclude all mineral lands (except coal and iron lands) which were inserted in patents issued to railroad companies covering lands granted them under certain railroad grant statutes are void.

William E. Block, Jr., A-27080 (April 6, 1955)

A railroad's claim to an unsurveyed island within the primary limits of its grant is one of the types of claims which the railroad has relinquished under a release filed pursuant to the Transportation Act of 1940.

Although title to an unsurveyed island in a navigable river passed to a railroad under its grant upon the filing of its map of definite location of its line, a patent confirming its right to "all" of the section in which the island is located, did not confirm its right to the unsurveyed island since the patent confirmed the railroad's right only to surveyed public land.

Northern Pacific Railway Company, Ralph L. Bassett, A-27114 (Oct. 20, 1955) 62 I. D. 401

Where a railroad company applies for a patent to lands pursuant to section 321(b) of the Transportation Act of 1940 (54 Stat. 954; 49 U. S. C. sec. 65(b)) because of its prior sale of the land, with a reservation of the minerals, to an innocent purchaser for value, a reconveyance to the United States of the reserved minerals made pursuant to the requirements of that act and the regulations thereunder, 43 CFR 273.68-273.73, if otherwise regular, must be accepted even though made subject to a condition or covenant contained in the deed to the innocent purchaser, requiring payment for the land used

RAILROAD GRANT LANDS--Continued

or injured by resulting mining operations. There is no authority for requiring that the condition or covenant be limited in its application to persons who acquire from the United States the right to mine the minerals.

Application, Billings 025721, Under Transportation Act of 1940, Northern Pacific Railway Company, M-36422 (Feb. 28, 1957)

After issuance of patent to a railroad for place lands under its land grant, title is vested in the railroad; the United States does not own the patented land and must reject offers to lease for oil and gas in such land.

Patricia T. Zebal et al., A-27616 (July 18, 1958) 65 I. D. 293

Oil and gas deposits in lands covered by a right-of-way acquired by a railroad under any law of the United States may be leased only to the owner or transferee of the right-of-way.

Bernie B. Bergevin, Tom Boskovich, A-27813 (Jan. 30, 1959)

Where a railroad granting act provided for the reservation of mineral lands from the grant, and the certification or patent passing legal title from the United States does not contain a mineral reservation, the United States has not reserved the minerals and the right to the surface and the mineral deposits under it have passed from the United States.

When the Department has certified lands to a State for the use and benefit of a railroad or issued a patent to it under the terms of a grant, the legal title is no longer in the United States and the Department has no further jurisdiction over the certified or patented lands.

H. S. Davis et al., A-27758, A-27849, A-27858 (Jan. 30, 1959)

RECLAMATION HOMESTEADS

GENERALLY

Where land within a reclamation homestead entry is reported to be prospectively valuable for oil and gas at and subsequent to the time when the entryman filed satisfactory reclamation final proof, it is proper to require the entryman to file a consent to a reservation in the United States of the oil and gas in the land covered by the entry.

Garth L. Wilhelm et al., A-27018 (Feb. 9, 1955) 62 I. D. 27

When land within a reclamation homestead entry upon which final reclamation proof has not been submitted and final certificate has not been issued is reported as prospectively valuable for oil and gas, the entryman or his successors are correctly required to file consent to a reservation in the United States of the oil and gas in the land included within the entry.

W. E. and Janet Shidler, A-27265 (Feb. 20, 1956)

By reason of section 5 of the act of June 25, 1910 (36 Stat. 835), there could no longer be any ordinary homestead entry onto a reclamation project after that date, only a special reclamation entry was contemplated by Congress.

Disposal of Land--Guernsey Reservoir, North Platte Project, M-36433 (Apr. 12, 1957)

Where land within a reclamation homestead entry upon which final reclamation proof has not been submitted is reported as prospectively valuable for oil and gas, the owner of the entry is correctly required to file consent to a reservation in the United States of the oil and gas in the land embraced within the entry in the absence of a satisfactory showing to support an application for a reclassification of the land as nonmineral.

John W. Mustonen, George Shipp, Glen L. Dix, A-27465, A-27467, A-27516 (Aug. 12, 1957)

When land within an amended reclamation farm unit is reported to be prospectively valuable for oil and gas before the entryman has fulfilled all of the requirements for patent, it is proper to require the entryman to file consent to reservation to the United States of the oil and gas covered by the entry or to contest the mineral classification of the land.

Mildon L. Patterson, A-27766 (Dec. 18, 1958)

RECLAMATION HOMESTEADS--Continued

GENERALLY--Continued

Where an application for the reinstatement of a canceled reclamation homestead entry is denied because the land applied for is no longer within a farm unit and the land is later placed in a farm unit, the application for reinstatement may be allowed, subject to payment of all proper charges.

Martha Kaulitzke, A-27628 (Oct. 29, 1959)

RECLAMATION LANDS

ACQUISITION AND DISPOSAL

Minerals may be reserved in patents issued under the act of March 31, 1950 (64 Stat. 39; 43 U. S. C., 1952 ed., sec. 375b-375f), only where either the act of July 17, 1914 (38 Stat. 509; 30 U. S. C., 1952 ed., sec. 121) or the act of June 22, 1910 (36 Stat. 583; 30 U. S. C., 1952 ed., sec. 83) applies. A tract classified as mineral in character because it is valuable for a locatable mineral cannot be sold under the act of 1950.

Mineral Reservations in Patents to be Issued Under the Act of March 31, 1950 (64 Stat. 39; 43 U. S. C., 1952 ed., sec. 375b-375f), M-36583 (Sept. 29, 1959)

RECONVEYANCE

The authority conferred by the surplus property disposal provisions of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377, 40 U.S.C. sec. 471 et seq.), as amended, are made, by section 602(c) of that act, paramount to the authority provided in subsection Q of section 4 of the act of December 5, 1924 (43 Stat. 672, 704, 43 U.S.C. sec. 376). When it is determined that lands, or interests therein, previously donated to the Government for reclamation purposes are no longer needed for such purposes, under current regulations of the General Services Administration, they may be reconveyed to the original owners or their successors in interest, under the provisions of subsection Q of the 1924 act, supra, only after there has been determination by the Administrator of General Services that such a disposition would not be inconsistent with the provisions of the Federal Property and Administrative Services Act of 1949, as amended.

Reconveyance of Donated Lands (Mar. 7, 1955) (Not published or mimeographed.)

REGULATIONS

(See also Administrative Procedure Act)

GENERALLY

The Secretary of the Interior has authority under the provisions of the act of June 6, 1924 (43 Stat. 464; 48 U.S.C. 221 et seq.), to prescribe the maximum number or type of boats or fishing gear that may fish within a designated fishing area in the waters of Alaska. He also may stipulate the area or areas within which a particular boat or gear will be permitted to fish. He also may require that each boat or type of gear be licensed and may fix a reasonable fee to be paid for any required license.

Act of June 6, 1924 (43 Stat. 464), M-36276 (April 22, 1955)

The act of August 12, 1954 (68 Stat. 698; 16 U.S.C. 1021 et seq.), authorizes the Secretary of the Interior to regulate the taking of salmon and herring on the high seas in areas contiguous to the territorial waters of Alaska.

Act of August 12, 1954 (68 Stat. 698), M-36273 (April 22, 1955)

A regulation which requires that, with certain exceptions, an offer for a noncompetitive oil and gas lease under the Mineral Leasing Act must include 640 acres of land is a reasonable exercise of the discretion vested in the Secretary of the Interior by the Mineral Leasing Act, and an offer which includes less than 640 acres and does not come within the exceptions is properly rejected.

Annie Dell Wheatley, The Superior Oil Company, Intervener, A-27142 (July 27, 1955) 62 I. D. 292

Where a regulation in effect at the time an application for an oil and gas lease is filed provides that no lease offers for less than 640 acres will be considered, an offer for less than 640 acres will be rejected.

August A. Frymark, A-27162 (Sept. 12, 1955)

An amendment of a regulation governing applications for oil and gas leases will not be applied retroactively to the detriment of an application which was filed prior to the amendment and which was in accord with the regulations in effect at the time of filing.

J. J. Newman Lumber Company, Alfred S. Black, A-27205 (Oct. 10, 1955)

REGULATIONS--Continued

GENERALLY--Continued

Where an act provides for the disposition of reserved minerals "under applicable law and such regulations as the Secretary may prescribe" the authority to determine the manner of disposal is limited to a determination of the applicable law and to the issuance of regulations not inconsistent with that law. There is no authority to prescribe a different method of disposal for the particular mineral than that provided by law.

Whether Titanium Minerals in Land Covered by Small Tract Leases or Patents will Become Subject to Lease upon Promulgation by the Secretary of the Interior of the Regulations Authorized by the Act of June 1, 1938 (52 Stat. 609; 43 U. S. C. sec. 682b), M-36308 (Oct. 28, 1955)

Where pursuant to authority granted by the departmental regulations, and for purposes of conservation and the effective utilization of grazing resources, a division of the range area is made into range units regarded as suitable by field officials of the Bureau of Indian Affairs, such action will not be disturbed in the absence of a showing that the division of the range was improper.

F. C. Gifford, IA-797 (June 15, 1956)

The Secretary has no authority to issue regulations providing for the leasing of copper and other minerals ordinarily subject to location under the United States mining laws, reserved to the United States in leases issued under the act of June 14, 1926 (44 Stat. 741), as amended by the act of June 4, 1954 (43 U.S. C. sec. 869).

Leasability of Locatable Minerals in Lands Leased Under the act of June 14, 1926 (44 Stat. 741), Before its Amendment, M-36403 (Jan. 25, 1957)

Where the regulations define "filed simultaneously" with respect to conflicting applications or offers as "filed at the same time," offers filed 1 or 10 seconds apart are not simultaneous filings, but the first offer received is filed prior to the next one.

Oil and Gas Leases--Simultaneous Filings, M-36435 (May 9, 1957) 64 I. D. 124

REGULATIONS--Continued

GENERALLY--Continued

The Bureau of Mines, pursuant to section 5 of the act of May 16, 1910, as amended (36 Stat. 369; 30 U. S. C. sec. 7), and sec. 212(a) of the Federal Coal Mine Safety Act (66 Stat. 692, 709; 30 U. S. C. sec. 482(a)), has the authority to revise existing regulations or to promulgate new regulations affecting equipment in gassy coal mines whether previously certified as permissible or not, provided, (1) the regulations affect equipment acquired and certified as permissible subsequent to July 16, 1952, and not excluded by the provisions of section 209(f)(1) of the Federal Coal Mine Safety Act; (2) a finding and determination is made by the Bureau based on facts and circumstances not conclusions that the equipment is not experimental but is a demonstrated safety device designed to decrease or eliminate mine fires and explosions caused by the use of such equipment in gassy coal mines; and (3) that the provisions of the Administrative Procedure Act (5 U. S. C. secs. 1001-1011) are followed.

Applicability of Proposed Regulations Requiring Modification of Electric Face Equipment in Gassy Coal Mines, M-36508 (May 7, 1958) 65 I. D. 211

The regulation (43 CFR 192.42(d)(2)), which fixes a minimum area of 640 acres for oil and gas lease offers unless a less area is surrounded by lands not available for leasing does not apply to submerged lands excluded from the upland by meander lines of the public survey unless such submerged lands have been determined to be beneath waters that are not navigable.

Applicability of 43 CFR 192.42(d)(2) to Beds of Non-Navigable Waters Adjacent to Public Lands, M-36512 (July 29, 1958)

APPLICABILITY

A regulation which provides that where a noncompetitive oil and gas lease is relinquished the land shall become available for the filing of new lease offers upon the notation of the relinquishment on the appropriate tract book is applicable even where the notation does not take place until after the end of what would have been the 5-year term of the lease in the absence of the relinquishment, and an application filed after that time but prior to the notation is prematurely filed and must be rejected.

M. A. Machris, Melvin A. Brown, A-27278 (June 11, 1956) 63 I. D. 161

REGULATIONS--Continued

APPLICABILITY--Continued

Where a lease provides that it is issued subject to regulations issued pursuant to a statute, in the absence of any other provision or indication to the contrary, the lease will be construed to incorporate only the regulations existing at the time when the lease was issued and not any future amendment of the regulations.

Gilbert V. Levin, A-27393 (Jan. 30, 1957)
64 I. D. 1

A regulation which provides that where a noncompetitive oil and gas lease is relinquished the land shall become available for the filing of new lease offers upon the notation of the relinquishment on the appropriate tract book is applicable even where the notation does not take place until after the end of what would have been the 5-year term of the lease in the absence of the relinquishment, and an application filed after that time but prior to the notation is prematurely filed and must be rejected.

Edward A. Gribi, Jr., Melvin A. Brown, A-27420 (Mar. 4, 1957)

Where a regulation governing renewal of small tract leases is amended after the issuance of a lease and is not specifically incorporated by reference in the lease, the regulation will be deemed applicable to the lease if it confers a benefit and not an added obligation on the lessee, does not affect the rights of others, and is not detrimental to the interests of the United States.

Henry Offe, A-27408 (Mar. 18, 1957)
64 I. D. 52

A regulation which provides that where a noncompetitive oil and gas lease is relinquished the land shall become available for the filing of new lease offers upon the notation of the relinquishment on the appropriate tract book is applicable even where the notation does not take place until after the end of what would have been the 5-year term of the lease in the absence of the relinquishment, and an application filed after that time but prior to the notation is prematurely filed and must be rejected.

Willie M. Cortes, Carl Dry, A-27438 (June 10, 1957)

A regulation which provides that where a noncompetitive oil and gas lease is relinquished the land shall become available for the filing of new lease offers upon the notation of the relinquishment on the appropriate tract book is applicable even where the notation does not take place until after the end of what would have been the 5-year term of the lease in the absence of the relinquishment, and an application filed after that time but prior to the notation is prematurely filed and must be rejected.

Lily L. Pearson et al., A-27505 (Nov. 15, 1957)

A regulation which provides that where a noncompetitive oil and gas lease is relinquished the land shall become available for the filing of new lease offers upon the notation of the relinquishment on the appropriate tract book is applicable even though the notation on the tract book of the existence of a prior lease may not have been made until the same date that a relinquishment of the lease was noted, and an application filed prior to the notation of the relinquishment is prematurely filed and must be rejected.

William V. Moore, A-27540 (May 13, 1958)
65 I. D. 227

When a regulation is found not to be in accord with law it should be appropriately amended.

Whether Common Carrier Provision of the Mineral Leasing Act Must be Inserted in all Gas Pipeline Rights-of-Way, M-36517 (July 23, 1958)

INTERPRETATION

Where an applicant is to be deprived of a statutory preference right because of his failure to comply with the requirements of a regulation, that regulation should be so clear that there is no basis for the applicant's noncompliance therewith.

Donald C. Ingersoll, A-27306 (Dec. 5, 1956)
63 I. D. 397

A filing fee of $10 is payable by an adverse claimant at the time of filing an adverse claim against an application for mineral patent (43 CFR 185.84), but failure to pay the required fee at the time of submitting the claim does not nullify an otherwise sufficient claim, and the fact that

REGULATIONS--Continued

INTERPRETATION--Continued

the required fee was not paid until after the expiration of the period allowed for filing the claim does not defeat the claim, the fee having been promptly paid when requested of the adverse claimants.

California Perlite Corporation et al., A-27444 (July 22, 1957)

A petition for reopening of a probate not filed within a period of 3 years from the date of a decision by an Examiner of Inheritance may be denied under regulations contained in 25 CFR 15.18.

Estate of Mary Moses, Colville Allottee No. S-33, IA-851 (Nov. 17, 1958)

Where a female migratory bird is lawfully possessed without a permit by a public institution, the increase or progeny of such female bird may be lawfully possessed without a permit by such public institution.

Section 6.14, Title 50, Code of Federal Regulations, relating to migratory birds, permits zoological parks and other public institutions to possess, transport, and dispose of lawfully acquired migratory birds without a permit and the captive female whooping crane known as Josephine may, therefore, be lawfully possessed by the Audubon Park Zoo in New Orleans.

Ownership of Certain Captive Whooping Cranes, M-36571 (Jul. 20, 1959)

VALIDITY

Where in a private law Congress requires that a party, in order to obtain certain relief, be found to have complied with the requirements of a statute and the regulations issued thereunder, the validity of the regulations is not open to attack in a proceeding to determine compliance.

Matanuska Valley Lines, Inc., et al., A-27545 (May 12, 1958) 65 I. D. 214

A regulation which requires that, with certain exceptions, an offer for a noncompetitive oil and gas lease under the Mineral Leasing Act must include not less than 640 acres is a reasonable exercise of the discretion vested in the Secretary of the Interior by the Mineral Leasing Act.

W. H. Burnett, William Weinberg, A-28037 (Aug. 20, 1959)

REGULATIONS--Continued

VALIDITY--Continued

A regulation which requires that, with certain exceptions, an offer for a noncompetitive oil and gas lease under the Mineral Leasing Act must include not less than 640 acres is a reasonable exercise of the discretion vested in the Secretary of the Interior by the Mineral Leasing Act.

W. H. Burnett, William Weinberg, A-28046 (Aug. 31, 1959)

REORGANIZATION PLANS

Reorganization Plan No. 3 of 1950 removed any limitations which the provisions of section 3 of Reorganization Plan No. III, of 1940 may have imposed with respect to the organization through which functions relating to fish or wildlife are to be performed.

Assistant Directors, Fish and Wildlife Service, M-36258 (Jan. 20, 1955) 62 I. D. 65

The reorganization of legal activities of the Department represents an exercise by the Secretary of continuing authority under Reorganization Plan No. 3 of 1950 to transfer and reassign functions.

Transfer of Funds to Office of Solicitor, M-36233 (May 19, 1955) 62 I. D. 181

The mineral leasing authority of the Secretary of Agriculture with respect to lands acquired for National forests under the act of March 4, 1917 (39 Stat. 1150), those acquired by gift or donation for National forest purposes under section 7 of the act of June 7, 1924 (43 Stat. 654), and those acquired generally under the Bankhead-Jones Farm Tenant Act (7 U.S.C. secs. 1001 et seq.) was transferred to the Secretary of the Interior under the provisions of Reorganization Plan No. 3 of 1946 (60 Stat. 1099). However, since the act of March 3, 1925 (43 Stat. 1133), contains no authority for the disposition of minerals in lands donated to the Forest Service thereunder, Reorganization Plan No. 3 makes no reference to that act and the leasing authority of the Secretary of the Interior with respect to such lands is limited to that contained in the Acquired Lands Leasing Act of August 7, 1947 (61 Stat. 913; 30 U.S.C. secs. 315 et seq.).

Applicability of the General Mining and Mineral Leasing Laws to Lands Acquired for National Forests, M-36421 (Feb. 18, 1957)

RES ADJUDICATA

Where a patent on an enlarged homestead entry with a reservation to the United States of oil and gas was issued more than 36 years ago and the entryman later filed a petition requesting issuance of an unrestricted patent on the entry, which petition was denied more than 33 years ago, and the entryman did not appeal from the denial, the matter is res adjudicata and will not be reopened upon an application for an unrestricted patent by a subsequent owner of a portion of the land who does not conclusively establish that the mineral reservation was unauthorized and who has no equities entitling him to an unrestricted patent.

Edward Christman et al., A-27052 (April 1, 1955) 62 I. D. 127

RIGHTS-OF-WAY

(See also, Indian Lands, Outer Continental Shelf Lands Act)

GENERALLY

Where the parties to a contract for the clearing of a right-of-way have construed the provisions of the specifications applicable, strictly speaking, only to the right-of-way itself as applicable also to adjacent danger tree areas, the Board will adopt the practical construction put upon the requirements of the contract by the parties themselves.

Appeal of Paul C. Helmick Co., IBCA-39 (July 31, 1956) 63 I. D. 209

Rights-of-way and other encumbrances are not to be arbitrarily altered by conveyances relying for authority upon Indian termination legislation.

Revocable permits for rights-of-way over trust or allotted Indian land need no longer be issued since the enactment of the act of February 8, 1948 (62 Stat. 17; 26 U. S. C. sec. 323), authorized the Secretary to grant rights-of-way.

Effect of Terminal Legislation Upon Revocable Rights-of-Way and Other Real Property Encumbrances on Indian Lands, M-36369 (Sept. 17, 1956)

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

The act of February 5, 1948 (62 Stat. 17; 25 U. S. C. sec. 323), providing for "rights-of-way for all purposes" over and across Indian lands applies to sites for all features and facilities, including dams, reservoirs, powerplants, and construction and operating camps, appropriate to water control projects undertaken by the United States.

Utilization of Lands in the Navajo Indian Reservation for Glen Canyon Dam and Reservoir, M-36395 (Mar. 22, 1957). 64 I. D. 70

Prior to the enactment of the act of July 23, 1955 (69 Stat. 367; 30 U. S. C., 1952 ed., Supp. IV, sec. 601), no right-of-way across a valid, unpatented mining claim which would continue after patent could be initiated solely through construction by the United States. The act above cited, which reserved to the United States the right of access across unpatented mining claims, was limited in its effect to the period "prior to the issuance of patent" to the claim and cannot be construed to authorize such access across such a claim after issuance of patent.

Access Road Construction--Effect of Waivers and Determinations Given Under Public Law 167, 84th Congress, M-36493 (Apr. 23, 1958) 65 I. D. 200

The Department may require an applicant for a reservoir right-of-way to enter into a stipulation assuring public access for wildlife and recreation purposes if the Department's authority to issue the right-of-way is discretionary, as is the case with respect to section 4 of the Taylor Grazing Act.

Stipulations, in Connection with Right-of-Way Permits for Reservoir Construction, to Assure Public Access, M-36500 (May 5, 1958)

In approving a right-of-way for a reservoir, the Secretary of the Interior may adopt or approve such measures as are reasonably necessary and proper to protect Federal interests or to effectuate Federal wildlife and conservation programs.

Board of Commissioners, City and County of Denver, A-27748 (Oct. 13, 1959)

RIGHTS-OF-WAY--Continued

APPLICATIONS

A right-of-way application under the act of February 1, 1905, should be suspended rather than rejected pending final disposition of a prior, possibly conflicting application under the same act.

Trustees of Pueblo Water Works, John P. Elliott, A-27371 (Aug. 15, 1956)

Action on an application for a right-of-way for a ditch for transporting water through national forest land situated within a short distance of land included in another right-of-way application for an identical purpose is properly suspended pending the outcome of court proceedings involving priority in the use of the water to be transported through the proposed rights-of-way where the Forest Service recommends such suspension because it wishes to avoid unwarranted denuding of timber lands in the area (there being a similar ditch now in existence in the immediate vicinity of the land applied for), and because until after the adjudication is completed it is uncertain whether the applicant can use the proposed right-of-way for the purpose intended.

John P. Elliott, Edgar C. Weers, A-27460 (Aug. 14, 1957)

CANCELLATION

Rights-of-way leases and other encumbrances on property transferred pursuant to termination legislation, subject to the Secretary of the Interior's power of revocation, cannot be revoked solely to facilitate termination of guardianship activities.

Effect of Terminal Legislation Upon Revocable Rights-of-Way and Other Real Property Encumbrances on Indian Lands, M-36369 (Sept. 17, 1956)

NATURE OF INTEREST GRANTED

The act of March 3, 1875, granted only an easement, and the grantee had no right to the underlying oil and minerals.

Availability for Leasing of Certain Lands on the Jicarilla Apache Indian Reservation, M-36507 (Mar. 14, 1958) (Memorandum from Regional Solicitor, Denver, Colorado, to State Supervisor, Bureau of Land Management, Santa Fe, New Mexico.)

RIGHTS-OF-WAY--Continued

ACT OF MARCH 3, 1891

A reservoir site may be acquired under the act of 1891 either by construction of a reservoir on vacant surveyed or unsurveyed public land or by departmental approval of a map of the site if on surveyed land. A map of a site on unsurveyed land may be accepted for filing and information only.

A reservoir site acquired under the act of 1891 either by approval of a map or by construction of the reservoir is subject to any oil and gas lease offer filed prior to the site application or to such construction and a lease issued to the offeror will include the oil and gas deposits underlying the site.

Whether Either an Application Under Section 18 of the Act of March 3, 1891 (26 Stat. 1101; 43 U.S.C. sec. 946), for a Reservoir Site or the Construction of a Reservoir on Unsurveyed Lands Bars Issuance of an Oil and Gas Lease Under the Act of 1920 (30 U.S.C. sec. 181 et seq.), M-36446 (June 25, 1957) 64 I. D. 251

The Department may require an applicant for a reservoir right-of-way to enter into a stipulation assuring public access for wildlife and recreation purposes if the right-of-way is in the nature of an easement, as is the case with respect to rights-of-way issued under the act of March 3, 1891, and if the exercise of the privilege would not impair substantially the full exercise of the rights of the easement holder.

Stipulations, in Connection with Right-of-Way Permits for Reservoir Construction, to Assure Public Access, M-36500 (May 5, 1958)

ACT OF JANUARY 21, 1895

One who applies for a right-of-way under the act of January 21, 1895, must comply with the requirements of the regulations and pay whatever fee that they require. And, whether he acquire a right-of-way under an appropriate rights-of-way act or use the land for that or any other purpose, he must comply with all applicable regulations issued under the Oregon and California Grant land laws, which are directed to the management of the area, but such regulations may not impose fees for the enjoyment of rights granted by other laws unless clearly authorized by law.

RIGHTS-OF-WAY--Continued

ACT OF JANUARY 21, 1895--Continued

The United States mining laws give to the locators and owners of mining claims as a necessary incident the right of ingress and egress across public lands to their claims for purposes of maintaining the claims and as a means toward removing the minerals.

Rights of Mining Claimants to Access Over Public Lands to Their Claims, M-36584 (Oct. 20, 1959) 66 I. D. 361

ACT OF FEBRUARY 1, 1905

Where the Forest Service recommends that an application for a right-of-way across forest lands not be allowed unless a prior application for a similar right-of-way is relinquished, on the assumption that the two applications directly conflict, and it appears that there is no conflict between the applications, it is proper to ask the Forest Service to reconsider its recommendation.

Section 4 of the act of February 1, 1905, granting rights-of-way over lands within national forests for municipal purposes does not require that the right-of-way be used for the personal benefit of the applicant and makes no distinction between private and public applicants for such grants.

Trustees of Pueblo Water Works, John P. Elliott, A-27371 (Aug. 15, 1956)

By departmental regulation, an application for a right-of-way over lands within a national forest under section 4 of the act of February 1, 1905, may not be approved until it is determined that allowance of the application will not be contrary to the public interest.

Action on an application for a right-of-way for a ditch for transporting water through national forest land situated within a short distance of land included in another right-of-way application for an identical purpose is properly suspended pending the outcome of court proceedings involving priority in the use of the water to be transported through the proposed rights-of-way where the Forest Service recommends such suspension because it wishes to avoid unwarranted denuding of timber lands in the area (there being a similar ditch now in existence in the immediate vicinity

RIGHTS-OF-WAY--Continued

ACT OF FEBRUARY 1, 1905--Continued

of the land applied for), and because until after the adjudication is completed it is uncertain whether the applicant can use the proposed right-of-way for the purpose intended.

John P. Elliott, Edgar C. Weers, A-27460 (Aug. 14, 1957)

ACT OF FEBRUARY 25, 1920

The proviso added to section 28 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 185), by the act of August 12, 1953 (67 Stat. 557), does not relieve the Secretary of the Interior from the obligation imposed by that section of placing in all grants of oil and gas pipeline rights-of-way the express condition that they be constructed, operated and maintained as common carriers.

Whether Common Carrier Provision of the Mineral Leasing Act Must be Inserted in all Gas Pipeline Rights-of-Way, M-36517 (July 23, 1958)

The Secretary of the Interior (or his delegate) is authorized by section 29 of the Mineral Leasing Act to issue a permit for slant wells to be drilled through lands subject to that act, even though the land for which the permit is issued is merely covered by offers to lease for oil and gas, but no leases have been issued.

Floyd A. Wallis, The California Company, A-27547 (Sept. 19, 1958) 65 I. D. 417

ACT OF NOVEMBER 9, 1921

A throughway or limited-access highway may be established on public lands under sec. 17 of the Federal Aid Highway Act, and the regulations (43 CFR secs. 244.54-244.56). The Secretary of the Interior probably could reserve a special right of access to such highway if necessary to his administration of the public lands as a condition of his certification of the land for disposition to the State for highway purposes. In the absence of a special reservation, the United States as owner of the abutting lands, is subject to the same limitations on access to the highways as other adjoining owners under State law; and persons subsequently deriving title from the United States are subject to the

RIGHTS-OF-WAY--Continued

ACT OF NOVEMBER 9, 1921--Continued

same limitations. The Secretary of the Interior may surrender to the State a reserved right of access prior to disposing of the abutting lands.

Limitation of Access to Through-Highways Crossing Public Lands, M-36274 (April 15, 1955) 62 I. D. 158

The Federal Aid Highway Act of 1956 did not repeal section 17 of the Federal Aid Highway Act of November 9, 1921. The Secretary of Commerce may file applications for rights-of-way under either act.

Right-of-Way Provisions of the Federal Aid Highway Act of November 9, 1954, and the Federal Aid Highway Act of 1956, M-36366 (Aug. 28, 1956)

Consistent with the rule long sanctioned by the Courts and the Department that mining locations may be made over right-of-way easements, such locations may be made over highway rights-of-way acquired under the act of November 9, 1921, as amended, which grants an easement.

A material site under that act is more in the nature of a profit than an easement and is not subject to the same rule, because it confers the right to take and remove a part of the realty which is inconsistent with the rights inuring to the locator of a mining claim.

Mining Locations on Federal Aid Rights-of-Way, M-36554 (Mar. 24, 1959)

REVISED STATUTES SEC. 2477

A throughway or limited-access type of highway may be established across the public lands, under Rev. Stats. 2477 and the regulations (43 CFR secs. 244.57-244.59). The United States as grantor does not have any special right of access to such highways, other or different from that accorded other abutting owners under State law. Persons subsequently acquiring the abutting lands from the United States likewise do not have any special right of access which the State need consider for the purpose of eliminating by purchase or otherwise.

Limitation of Access to Through-Highways Crossing Public Lands, M-36274 (April 15, 1955) 62 I. D. 158

RULES OF PRACTICE

GENERALLY

Oral argument on an appeal to the Secretary will not be allowed where it serves no useful purpose.

Isabel Gunnerson et al., State of Nevada, A-26952 (Feb. 11, 1955)

The Director of the Bureau of Land Management may, before an appeal is taken to the Secretary, reconsider a previous decision on his own motion and correct any errors that may have been made in the former decision.

Ruby E. Huffman, Frances Torres, and Beulah Mae Choquette, A-27373 (Mar. 21, 1957) 64 I. D. 57

It is not a deprivation of "due process" for an officer other than the one who hears the evidence in a mining contest to decide the case.

United States v. Alonzo A. Adams et al., A-27364 (June 3, 1957) 64 I. D. 221

It is proper for the Eastern States Office of the Bureau of Land Management, on its own motion, to reconsider its decisions prior to an appeal to the Director, even though there are adverse rights present.

Humble Oil and Refining Company, A-27568 (May 29, 1958) 65 I. D. 257

The Director of the Bureau of Land Mangement may, before an appeal is taken to the Secretary of the Interior, reconsider his previous decision on his own motion and correct any error that may have been made in it.

Richfield Oil Corporation, A-27697 (Oct. 23, 1958)

APPEALS

Generally

An appeal from a decision of the Associate Director of the Bureau of Land Management will not be decided on its merits when action by the parties, after the filing of the appeal, has made a decision on the merits unnecessary.

Joel E. Collums et al., A-27150 (Mar. 7, 1955)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

An appeal from a decision of the Lands Officer of the Bureau of Land Management rejecting a private exchange application will not be decided on the merits when action taken by the appellant to amend his application after the filing of the appeal has made a decision on the merits unnecessary.

Marcellus Palmer, A-27193 (Aug. 2, 1955)

Where applicants for desert land entry have appealed from a classification of the lands included in their applications as unsuitable for desert land entry and where the Secretary of the Interior has ordered a further field examination to be made, action on the appeals will be suspended.

Richard Leslie McLeod et al., A-27112, A-27151 (Sept. 12, 1955)

An appeal from a decision of the Eastern States Supervisor, Bureau of Land Management, rendered on March 11, 1955, will not be summarily dismissed because of failure to comply in all respects with the rules of practice governing appeals to the Secretary of the Interior from decisions of the Director of the Bureau of Land Management.

J. J. Newman Lumber Company, Alfred S. Black, A-27205 (Oct. 10, 1955)

Where subsequent to the filing of an appeal to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management the appellant submits an offer in compromise to the Department which renders the appeal moot, the appeal will be dismissed and the case will be remanded to the Bureau for reconsideration.

Alaska Livestock and Trading Company, A-27311 (May 14, 1956)

Where the appellant submits no evidence to support his contention that the Director's decision is in error, the Director's decision will not be altered.

Grace F. Holbeck, A-27357 (Aug. 20, 1956)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

An appellant has the duty of showing affirmatively in what respect the decision appealed from is in error; it is insufficient that he merely repeats statements of error already advanced by him below without showing their connection with the decision appealed from or their relevance otherwise.

James L. Knight, A-27374 (Sept. 19, 1956)

Assuming that an objection to a hearing officer (that he was not appointed in accordance with the Administrative Procedure Act) would be timely if made for the first time on an appeal to the Director of the Bureau of Land Management, failure to raise the objection at that time will constitute a waiver of the objection.

United States v. Alonzo A. Adams et al., A-27364 (June 3, 1957) 64 I. D. 221

A motion to strike an answer filed by one who petitions to intervene on an appeal to the Secretary will be denied where the answer is a joint answer filed also by an adverse party who is entitled to answer the appeal.

The Dredge Corporation, A-27429 (Sept. 23, 1957) 64 I. D. 368

Where one appeals from the rejection of his oil and gas lease offer and subsequently files a withdrawal of his appeal with a request that a lease be issued to him, the withdrawal will not be considered to be an abandonment of the appeal and acquiescence in the rejection of the offer where the circumstances show that such was not the intention of the offeror.

B. M. Shotkin, A-27469 (Sept. 24, 1957)

The failure to pay a $5 filing fee for each of two leases involved in an appeal to the Director from a manager's decision does not require that the appeal be dismissed where (1) the regulation, later amended, was not clear, (2) the manager's decision stated that an appeal involving the two leases must be accompanied by a filing fee of $5, and (3) the manager accepted the $5 fee as sufficient.

D. J. Simmons, A-27478 (Nov. 15, 1957) 64 I. D. 413

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

Where in an appeal to the Director it is decided from examination of the case record that questions of fact are present which cannot be answered from the record and the case is remanded to the appropriate field officer for a determination of the necessary facts, an appeal from the decision lacks any basis where the appellant recognizes that his rights depend upon the resolution of the questions of fact.

Earl Edward Cherrier, A-27569 (Apr. 29, 1958)

A decision of the Director of the Bureau of Land Management will not be disturbed where the appellant merely requests the Secretary to consider the evidence or arguments submitted to the Director without showing affirmatively the relationship of that evidence or those arguments to the Director's decision and where the Director's decision, on its face, appears to be proper.

Renz L. Jennings, A-27589 (June 25, 1958)

Where the basis of an appeal to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, is a request for relief already granted in the Director's decision, and no other ground for appeal is stated, there is no issue to decide and the appeal will be dismissed.

James Veitch, A-27633 (July 16, 1958)

An appeal to the Secretary of the Interior will be dismissed and the case closed where the appellant fails to pay the filing fee within the time required by the rules of practice.

Christian G. Wieger, A-27680 (Sept. 29, 1958)
65 I. D. 402

Joe Lyon, Jr., A-27824 (Jan. 14, 1959)

By departmental regulation (43 CFR, 1957 Supp., 221.95(d)), where a party is represented by an attorney, service of any document relating to the proceeding upon such attorney will be deemed to be service on the party he represents, and service of a copy of a decision on an attorney of record is notice of receipt of the decision to the party he represents.

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

On an appeal to the Secretary from a decision denying an appeal from an examiner's decision which held 12 mining claims and a mill site null and void, a requirement that a $5 filing fee for each separate mining claim and the mill site accompany the notice of appeal was proper.

United States v. Bunno E. Matsen, A-27712
(Nov. 10, 1958) 65 I. D. 453

In the face of an apparent conflict between the official return receipt cards and the appellants' contention as to the delivery date of copies of decisions served on the appellants by certified mail, in the absence of substantial evidence to prove that the date of delivery stamp on the receipt cards is erroneous, the Department will accept the date stamped on the official receipt card.

Edwin Roy Hastings, A-27831 (Nov. 13, 1958)

Where notice of a decision of the Director of the Bureau of Land Management was served on the appellant by delivery of the notice by certified mail to the appellant's address of record, and the return receipt card showed that it was received at that address, the 30-day period within which a notice of appeal must be filed in the office of the Director began to run as of the date the notice was delivered to the record address, and the late filing of a notice of appeal cannot be waived on the ground that the appellant was away from home on the delivery date and did not actually receive the notice until several days later.

Beverly P. Robinson, A-27778 (Nov. 24, 1958)

Under rules governing its procedure, the Board of Contract Appeals is without authority to entertain more than one petition for reconsideration of a decision.

Appeals of Carson Construction Company,
IBCA-21, IBCA-25, IBCA-28, IBCA-34
(May 20, 1959) 66 I. D. 177

Where the decisions below pass only upon the question of the validity of the original location of a mining claim, the Secretary will not ordinarily on appeal from such decisions consider and determine other issues relating to

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

trespass by the claimant, the effectiveness of later locations, and other collateral issues not necessarily involved in passing upon the correctness of the decisions below.

Howard W. Balsley, A-27920 (Jun. 15, 1959)

The late filing of a notice of appeal cannot be waived under the rules of practice where the record shows the notice of appeal was not transmitted to the Director before the end of the 10-day grace period allowed by the rules.

Norman B. Wolford, A-28129 (Jul. 28, 1959)

A confession of error submitted by an Examiner of Inheritance for consideration in connection with an appeal from the Examiner's order will serve as justification for remanding the case to the Examiner for further action.

Estate of Ka-E-Pah, Navajo Allottee No. 1047, IA-1044 (Sept. 3, 1959) 66 I. D. 314

After an appeal is taken to the Director from a decision of a land office manager, jurisdiction over the case is in the former and the latter has no authority to act upon it.

Audrey I. Cutting, George Peter Smith, A-28031 (Oct. 8, 1959) 66 I. D. 348

Answers

Where an appellee submits no proof that he has served a copy of his answer to the appeal upon the appellant as required by the rules, his answer will be disregarded in deciding the appeal.

Hattie M. Fults, Ernest Maloof, A-27509 (Nov. 19, 1957)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal

An appeal to the Secretary of the Interior will be dismissed where it is subsequently withdrawn by the appellants.

Clair D. Jones et al., A-27055, A-27058, A-27061 (Jan. 7, 1955)

Charles C. Gremillion et al., A-27100 (Mar. 11, 1955)

Howard A. Warner, A-27111 (Mar. 18, 1955)

State of Oregon, A-27117 (April 15, 1955)

J. J. Newman Lumber Company, Alfred S. Black, A-27205 (Oct. 10, 1955)

Curtis D. Wheeler, A-27275 (Mar. 27, 1956)

State of Oklahoma, A-27190 (Apr. 13, 1956)

Bette M. Snyder, A-27349 (May 14, 1956)

Thomas D. Christopher, A-27358 (May 24, 1956)

Irma Gregg, A-27336 (June 29, 1956)

Alvin James, A-27401 (Nov. 13, 1956)

D. B. Huttaball et al., A-27430 (Nov. 28, 1956)

Herbert C. Ward and Wilbert Maddox, A-27443 (Feb. 11, 1957)

J. R. Simplot Company, A-27533 (Oct. 21, 1957)

The Frontier Refining Company, A-27511 (Dec. 30, 1957)

William N. Wilson, A-27565 (Apr. 8, 1958)

Max L. Krueger, Vaughan B. Connelly, A-27522 (Apr. 30, 1958) 65 I. D. 185

Jane R. Carter, A-27768-A (July 29, 1958)

State of Oregon, A-27767 (Sept. 22, 1958)

Merwin E. Liss, A-27848a (Oct. 10, 1958)

Alfred B. Corda et al., A-27814 (Oct. 16, 1958)

United States v. A. P. Smothers, A-27826 (Oct. 16, 1958)

Leo and Lenza Wilson, A-27832 (Nov. 28, 1958)

Fred H. Winters, A-27948 (Jan. 14, 1959)

Olaf George et al., A-27958 (Jan. 29, 1959)

Nettie M. Lewis, A-27768-B (Mar. 31, 1959)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

An appeal to the Secretary of the Interior will be dismissed where it is subsequently withdrawn by the appellants. (List of cases continued from page 377.)

United States v. Rim Rock Mining Corporation, A-27860 (Apr. 27, 1959)

Edwin W. Stockmeyer, Charles J. Babington, A-27976 (May 14, 1959)

Eleanor C. Beritzhoff, A-28060 (June 15, 1959)

McGreghar Land Company, A-28068 (July 16, 1959)

Richard K. Todd et al., A-28090-A (July 27, 1959)

Doris L. Ervin et al., A-28185 (Sept. 3, 1959)

Merwin E. Liss, A-28143 (Sept. 4, 1959)

Forest Service, Department of Agriculture, A-28214 (Oct. 30, 1959)

Richard K. Todd et al., A-28090-B (Nov. 23, 1959)

In a case of disputed heirship to an Indian's estate, the finding of an Examiner of Inheritance, which is supported by the best available evidence, and which is in accord with the Departmental probate records, will not be disturbed.

Estate of Joshua Comes Out, IA-209 (Mar. 10, 1955)

An appeal from a partial rejection of a sodium prospecting permit application will be dismissed where, after the appeal is taken, the application is withdrawn as to the land which was the subject of the partial rejection.

James E. Croudace et al., A-27054, A-27056 (Mar. 14, 1955)

An appeal will be dismissed where, after a request for reconsideration of a departmental decision is received, the appeal is withdrawn.

State of California, William L. Patch, A-26416 (On reconsideration) (Mar. 18, 1955)

An appeal will be dismissed where, after it is filed, all protests and appeals in the case are withdrawn.

J. C. Peacock, A-27115 (April 15, 1955)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

Where parties to an appeal request that it be dismissed, subject to the approval of an agreement between the parties regarding use of the Federal range, the appeal will be dismissed without prejudice to the right of the appellant to have the appeal reinstated if the agreement solving the controversy between the parties should not be approved.

R. L. Cox, Barth Mercantile Co., Inc., A-27207 (July 25, 1955)

A request for reconsideration of action dismissing an appeal and approving the lost will of a deceased Indian will be denied where the petition fails to show persuasively that the decision reached an improper or unjust result.

Estate of Ute, Arapaho Allottee No. 1070, IA-143 (Aug. 25, 1955)

An appeal to the Secretary from the rejection of an oil and gas lease offer will be dismissed where, subsequent to the filing of the appeal, the appellant withdraws his lease offer.

L. P. Arnold, A-27159 (Dec. 12, 1955)

Where appellants seek to withdraw their appeal to the Secretary of the Interior on condition that the Bureau of Land Management take certain action, the appeal will not be dismissed until the Bureau of Land Management has considered the proposal made by the appellants and taken the action upon which the withdrawal has been conditioned.

Eli S. Perkins and John L. Perkins, A-27268 (Feb. 6, 1956)

An appeal to the Secretary of the Interior from the dismissal of a protest against the issuance of an oil and gas lease will be dismissed where, after the appeal is taken, the applicant for the lease withdraws his application.

Halvor F. Holbeck, Del Grant, A-27333 (May 7, 1956)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

An appeal to the Secretary of the Interior which concerns an issue which has not been ruled on by the Director of the Bureau of Land Management is premature and will be dismissed.

Leslie Ardell Silliman, Lester Elden Clement et al., A-27255, A-27302 (May 31, 1956)

An appeal from a decision of the Director of the Bureau of Land Management rejecting a public sale application will be dismissed where the appellant relinquishes his application after filing the appeal.

James O. Hammontree, A-27320 (June 18, 1956)

Where an appeal is taken from the rejection of an oil and gas lease offer as to certain tracts of land and the appeal is then withdrawn as to some of the tracts, the appeal will be dismissed to the extent that it applies to those tracts.

Irma Gregg, A-27344 (Aug. 9, 1956)

Where an appeal to the Secretary is filed late but the appeal is in reality a continuation of a proceeding which was previously before the Secretary on appeal and was remanded to the Bureau of Land Management for further investigation and action, the sanction of summary dismissal for a late appeal need not be invoked and the appeal may be considered on the merits.

George and John Arkoosh, Vivian Bahr, A-26988 (Supp.) (Aug. 14, 1956)

Where a withdrawal of an appeal to the Secretary is filed with a reservation of the right of the contending parties to attack the decision appealed from in future proceedings, the withdrawal will be accepted and the appeal dismissed where it is shown that the reservation is intended only to relate to issues which were not specifically or completely ruled upon in the decision from which the appeal was taken.

M. J. Dougherty, A-27341 (Aug. 20, 1956)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

An appeal to the Secretary will be dismissed where the issue involved is moot.

Louis F. Jaussaud et al., A-27290 (July 16, 1957)

Newton L. Hall, A-27646 (Aug. 4, 1958)

Eugene Miller, A-27666 (August 18, 1958)

Where before an appeal from a decision canceling an oil and gas lease is decided the primary term of the lease has expired and the lessee is not entitled to an extension of his lease, the appeal becomes moot and will be dismissed.

Duncan Miller, B. E. Chamberlin, A-27458 (Aug. 12, 1957)

An appeal to the Secretary will be dismissed where the parties agree to a withdrawal of the appeal and ask that it be dismissed.

Martha Monsen et al., A-27452 (Oct. 30, 1957)

An appeal to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, will be dismissed where it is subsequently withdrawn by the appellant.

Owen Ault, A-27574 (Dec. 13, 1957)

Where an appellant mistakenly appeals to the Secretary from a decision favorable to him by the Director of the Bureau of Land Management and then asks that his appeal be disregarded, the appeal will be dismissed.

Harold V. Noble, A-27587 (Jan. 21, 1958)

An appeal to the Secretary of the Interior from the rejection of a noncompetitive oil and gas lease offer will be dismissed where, after the appeal is taken, the appellant withdraws his offer.

Helen Bugas, A-27584 (Mar. 10, 1958)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

An appeal to the Secretary of the Interior will be dismissed where it is subsequently withdrawn by the parties in interest.

James J. O'Keane, A-27597 (Mar. 28, 1958)

Where an appellant withdraws his appeal on the condition that a request made by the adverse party will be granted, which would render the appeal moot, the appeal will be dismissed conditionally.

Boris I. Kammerman et al., A-27655 (May 2, 1958)

Where the Director, Bureau of Land Management, properly dismisses an appeal to him because the appellant fails to file a statement of the reasons for the appeal within the time required, and, where, after the time allowed for the filing of an appeal to the Secretary has elapsed and no appeal is taken to the Secretary, the Director inadvertently issues a second decision dismissing the appeal for the same procedural reason and subsequently vacates his second decision, appeals from the second and third decisions will not be entertained so that the case can be considered on its merits by the Secretary.

Ruth Ellis Barry Cowan, A-27876 (Jan. 8, 1959)

Where a contractor fails to prosecute an appeal with reasonable diligence, as by failing to respond for many months to an inquiry from the Board of Contract Appeals concerning the question whether the appeal has not become moot by reason of circumstances transpiring after its filing, the appeal will be dismissed for want of prosecution.

Appeal of Parker-Schram Company, IBCA-119 (Jan. 28, 1959)

If a timely notice of appeal from findings of fact of a contracting officer, when considered with the documents referred to therein and contained in the appeal file, states with sufficient particularity the grounds of the appeal, a Government motion to dismiss the appeal because the contractor failed to file on time a brief in support of the appeal will be denied. However, in view of the failure of the contractor to reply to the motion to dismiss or offer any excuse for the tardy filing of the brief, the Board will disregard the brief in support of the appeal.

Appeal of Flora Construction Company, IBCA-180 (Mar. 2, 1959)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

As the Federal Range Code for Grazing Districts requires that notice of intention to appeal to the Director of the Bureau of Land Management from a decision of a hearing examiner must be filed within 10 days after the receipt of the hearing examiner's decision by the appellant, it is proper for the Director to dismiss an appeal to him where it is shown that the notice of intention to appeal was filed after the 10-day period had elapsed.

William S. Young et al., A-27894 (Mar. 13, 1959) 66 I. D. 113

The unintentional misdirection of a supporting brief in a contract appeal by mailing it directly to the Board of Contract Appeals rather than to the Board through the contracting officer, as required by the regulations does not in itself justify the dismissal of an otherwise proper appeal.

Appeal of Henly Construction Company, Inc., IBCA-165 (Mar. 18, 1959)

An appeal to the Secretary from the rejection of an oil and gas lease offer will be dismissed where the appellant subsequently requests cancellation of his offer.

H. L. Stickney, A-27984 (May 28, 1959)

When an appellant has met all necessary requirements to continue his grazing permit and the relative questions involved in his appeal have become moot, the appeal record will be closed.

L. D. Putnam, IA-1047 (Jul. 6, 1959)

An appeal will be dismissed in part where the appellant requests a withdrawal of the appeal insofar as it pertains to a portion of the land involved.

Ferris F. Boothe, A-28058-A (Aug. 19, 1959)

Where the contracting officer fully informs a contractor of the right of appeal and of the necessary procedural steps to be taken, and appellant remains inactive and silent and does not perfect appeal, the appeal will be dismissed for lack of prosecution.

Appeal of Henkle and Company, IBCA-212 (Sept. 15, 1959) 66 I. D. 331

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

An appeal to the Director of the Bureau of Land Management from the rejection of an oil and gas lease offer is properly dismissed where after the notice of appeal is filed the appellant withdraws his lease offer and requests a refund of the payment of advance rentals.

Paul D. Haynes, A-28043 (Sept. 21, 1959) 66 I. D. 332

Where a contracting officer withdraws findings of fact from which an appeal has been taken, where the appellant concurs in such withdrawal, and where no reason for denying effect to such withdrawal appears, the withdrawal will be confirmed and the appeal will be dismissed.

Appeal of Layne and Bowler Export Corporation, IBCA-225 (Nov. 19, 1959)

Where an appellant withdraws his appeal to the Secretary for the purpose of permitting the Director of the Bureau of Land Management to reconsider the decision appealed from, the appeal will be dismissed without prejudice to the appellant to appeal from a subsequent unfavorable decision by the Director on reconsideration of the case.

Service Pipeline Company, A-28231 (Nov. 23, 1959)

An appeal to the Secretary of the Interior will be dismissed where action of the appellant has rendered the appeal moot.

Walter P. Sharpe, A-28181 (Dec. 1, 1959)

The Board lacks jurisdiction in absence of a disputes provision in the contract.

Appeal of Ocean Tow, Inc., IBCA-105 (Dec. 3, 1959) 66 I. D. 409

Appeal will not be dismissed as untimely when appellant appeals from a letter meeting the minimum requirements of a findings of fact and decision within the 30-day period. Findings of fact and decision which do not meet minimum requirements need not be appealed.

Appeal of Irvin Prickett & Sons, Inc., IBCA-203 (Dec. 5, 1959)

RULES OF PRACTICE--Continued

APPEALS--Continued

Extensions of Time

Where, in an appeal to the Director, Bureau of Land Management, the appellants telegraphed a request for an extension of time within which to file a statement of reasons in support of their appeal on the last day of the period within which a statement of reasons was required to be filed, and because of circumstances beyond the control of the appellants the request was not delivered to the Bureau until after the office hours provided by the regulation for the filing of documents, the request for extension may be considered as timely filed and the appeal need not be summarily dismissed.

United States v. George J. Patee et al., A-27694 (Oct. 30, 1958)

The rules of practice do not authorize officials of the Bureau of Land Management to grant extensions of time for the filing of notices of appeal to the Secretary of the Interior or paying the filing fee.

Ollie W. Brooks, A-27856 (Mar. 30, 1959) 66 I. D. 108

The manager of a land office is not authorized to extend the time for filing a notice of appeal to the Director of the Bureau of Land Management.

J. S. Thompson, R. D. Laird, A-28098 (Oct. 29, 1959)

Failure to Appeal

Where an entryman fails to appeal from the rejection of his final proof based upon his failure to comply with a condition improperly imposed upon him more than 2 years after the date of the register's receipt, he loses whatever rights he had under his final proof.

Garth L. Wilhelm et al., A-27018 (Feb. 9, 1955) 62 I. D. 27

One whose oil and gas lease is erroneously canceled and who fails to appeal from the decision canceling the lease loses his rights in his lease.

C. T. Hegwer et al., A-27002 (Mar. 11, 1955) 62 I. D. 77

RULES OF PRACTICE--Continued

APPEALS--Continued

Failure to Appeal--Continued

One who fails to appeal from the partial rejection of an oil and gas lease application is not entitled to reinstatement of the application with priority over an intervening applicant, even though the rejection was erroneous.

Edward Christman et al., A-27052 (April 1, 1955) 62 I. D. 127

Where a decision of a land office manager contains a questionable ruling on a particular legal issue, but the party adversely affected, though apprised of his remedy to appeal, fails to do so, there is no need, in the appeal to the Secretary of a subsequent, collateral case, to decide such legal issue if it is not necessarily involved in a proper disposition of the appeal at hand. Moreover, in such circumstances the importance of administrative finality cannot be disregarded.

Eugene J. Bernardini, Albert Chester Travis, A-27093 (June 20, 1955) 62 I. D. 231

Where several applications are rejected by a manager and one of the applicants fails to appeal to the Director of the Bureau of Land Management, the applicant cannot later appeal to the Secretary from a decision by the Director affirming the decision of the manager on appeals by the other applicants.

Lee Kisner et al., A-27189 (Nov. 7, 1955)

Where an applicant's notice of location of settlement of an Alaska headquarters site is rejected on the ground that the land involved has been classified for disposal under the Small Tract Act and therefore is not subject to other forms of entry, but the manager allows the appellant the right to either appeal his decision or file a small tract application, and the applicant does not appeal but instead files a small tract application which is junior in time to another small tract application, the appellant by failing to appeal from the manager's decision thereby waived any rights he may have had under his location notice and the land will be awarded to the first qualified small tract applicant.

William D. Cunningham, Alice F. McGrath, A-27297 (May 28, 1956)

RULES OF PRACTICE--Continued

APPEALS--Continued

Failure to Appeal--Continued

Where an offer to lease land under the Small Tract Act is rejected by the manager on the grounds that the land has been classified as suitable for disposition under the public sale laws, but the applicant is given the right to either appeal to the Director or show cause why his application should not be finally rejected, and the applicant fails to appeal or to make any showing, the applicant abandons any rights he may have acquired by his application, like a veterans' preference right, and may not at a later date reclaim his preference right when the land is reclassified as suitable for small tract disposition.

John R. Moran, Frankie Azalee Johnson, A-27463 (Oct. 21, 1957)

Where a desert land applicant whose application has been rejected does not object to the rejection but requests the Bureau of Land Management to reinstate his application, and does not object to an announced drawing for the purpose of determining priority between his reinstated application and a conflicting application, his application loses whatever priority it afforded him prior to its reinstatement and he cannot be heard to complain--after the drawing is held and the conflicting application for the same land is given priority--that his application was in good standing and did not need reinstatement and that a drawing was not necessary.

Dianne L. Somsen, Lalovi L. Butler, A-27514 (Jan. 20, 1958)

Where a decision of the manager of a land office gives an applicant for an extension of an oil and gas lease 30 days in which to file a bond or to take an appeal, failing in which the application for extension will be denied and the lease deemed to have expired, and the applicant does neither within the time allowed, he loses his right to have the manager's decision reviewed on the merits.

Paul H. Dudley, A-27672 (Oct. 30, 1958) 65 I. D. 449

RULES OF PRACTICE--Continued

APPEALS--Continued

Hearings

A tender of evidence serving only to impeach a witness who has testified to the competency of testatrix at the time of the making of her will, when there remains other credible testimony in support of her competency, does not constitute persuasive justification for granting a rehearing.

Estate of Lean Woman (Sankey), Arapaho Allottee No. 1487, IA-886 (Jun. 24, 1959)

Mere insinuations of fraud and collusion which are unsupported by any evidence do not justify a request for hearing for the purpose of taking evidence on the issues of fraud and collusion.

Andrew Ronald Nerland et al., A-27962 (Jun. 29, 1959)

Service on Adverse Party

An appeal to the Secretary of the Interior will be dismissed where the appellant did not file, within the time prescribed by the Department's rules of practice, a certificate showing service of notice of appeal upon a party having an adverse interest and no service in fact was made upon the adverse party.

Garth L. Wilhelm et al., A-27018 (Feb. 9, 1955) 62 I. D. 27

Kenneth W. Bolton, Frank B. Morse, A-27098 (April 18, 1955)

Lee R. Ormiston, A-27355 (May 14, 1956)

An appeal to the Secretary of the Interior will be dismissed when the appellant fails to show that he has served the notice of the appeal upon a party having an adverse interest.

Roy H. Unzicker, Ethel L. Zehner, A-27070 (Mar. 23, 1955)

Martin M. Kunz & Sons et al., A-27161 (Oct. 10, 1955)

Marlow D. Butler, Lala A. Butler, A-27186 (Oct. 10, 1955)

Everta P. Ericson, A-27264 (Mar. 12, 1956)

Isaac A. Himes, A-27423 (Nov. 26, 1956)

Della Lee Halloran, A-27433 (Jan. 31, 1957)

J. F. McKee, A-27853 (Mar. 2, 1959)

George William Renner, A-27979 (May 28, 1959)

RULES OF PRACTICE--Continued

APPEALS--Continued

Service on Adverse Party--Continued

An appeal to the Secretary of the Interior will be dismissed where the appellant did not file, within the time required by the Department's rules of practice, a certificate showing service of notice of the appeal upon a party having an adverse interest.

Inert Amundson, Peter Evans, A-27078 (Mar. 24, 1955)

R. L. Greene et al., A-27181 (May 11, 1955)

Sam Henry Bober & Sons, Inc., A-27141 (June 21, 1955)

Edna R. (Anderson) Fife, A-27216 (Dec. 12, 1955)

Marion F. Jensen et al., Elden F. Keith et al., A-27254, A-27256, A-27257 (Feb. 24, 1956) 63 I. D. 71

An appeal from a decision by an Examiner of Inheritance denying petitions for rehearing must be filed by a person aggrieved by the Examiner's decision, or by such person's attorney or representative, and where copies of an appeal were not furnished to the adverse parties as required by the probate regulations, the appeal will be dismissed.

Estate of Charles O'Brien, Unallotted Kikialus Indian, IA-142 (June 20, 1955)

An appeal to the Secretary of the Interior will be dismissed where the appellant did not file, within the time allowed by the Department's rules of practice, a certificate showing service of a copy of his appeal upon a party having an adverse interest, and there is no evidence that service was ever made upon the adverse party.

Lloyd Dean Cureton, A-27208 (Nov. 7, 1955)

As the rules of practice of the Department require an appellant, where the decision of the Director of the Bureau of Land Management indicates that another party has an interest in the proceeding adverse to the appellant, to file a certificate showing that a copy of the notice of appeal has been served on such adverse party, the Director's decision should identify the adverse party in order that the appellant may meet this requirement.

Madison Oils, Inc., T. F. Hodge, A-27163 (Dec. 28, 1955) 62 I. D. 478

RULES OF PRACTICE--Continued

APPEALS--Continued

Service on Adverse Party--Continued

An appeal to the Secretary will be dismissed when the appellant fails to serve a copy of the notice of appeal upon the adverse party.

A. R. Spikes, A-27000 (Feb. 20, 1956)

Mamie E. White, A-27231 (May 7, 1957)

William B. Jordan, A-27531 (Nov. 1, 1957)

Great Western Oil Company, A-27873 (Dec. 9, 1958)

William G. Tauscher, Andrew F. Taylor, A-27878 (Mar. 5, 1959)

Gladstone Schwesinger, A-27946 (Mar. 31, 1959)

United States v. Napolean D. Cote et al., A-28021 (June 15, 1959)

Fred W. Ringert, A-28018 (June 15, 1959)

James C. Jeskey, A-28036 (June 15, 1959)

Ervin Carl and Sadie V. Lembke, A-28015 (June 29, 1959)

Lawrence Edwin Steere, A-28074 (July 16, 1959)

United States v. Dickson A. Boyd, A-28086 (July 17, 1959)

Paul Jungert, A-28091 (Aug. 21, 1959)

Robert Bruce Sandstrom, A-28259 (Dec. 18, 1959)

One who appeals from a manager's decision is not required to serve a copy of his appeal on an adverse party where no such party is named or indicated in the manager's decision.

A strict enforcement of the requirement that an appellant from a manager's decision must serve an adverse party will not always be required where the adverse party is in fact, but belatedly, served and has ample opportunity to answer the appeal.

John R. Ross et al., A-27259 (Mar. 12, 1956)

An appeal to the Secretary of the Interior will be dismissed where the appellant did not file, within the time prescribed by the Department's rules of practice, a certificate showing service of a copy of the notice of appeal upon the party shown by the decision of the Director of the Bureau of Land Management to have an adverse interest.

Carl V. Giem, Harvey Bros., Interveners, A-27299 (May 31, 1956)

RULES OF PRACTICE--Continued

APPEALS--Continued

Service on Adverse Party--Continued

An appeal to the Secretary will be dismissed where the appellant has failed to show that he served a copy of his appeal upon an adverse party within the time and in the manner required by the rules of practice, as revised effective May 1, 1956.

E. O. Bishop, John O. and Lucile V. Anderson, A-27397 (Jan. 28, 1957) 64 I. D. 25

An appeal to the Secretary of the Interior will be dismissed where the appellant has not filed proof showing service of notice of the appeal or the statement of reasons for the appeal upon parties having an adverse interest.

Charles Waldon Folsom, A-27428 (Jan. 31, 1957)

Where an appeal to the Secretary is dismissed for failure to serve a copy of the notice of appeal on the adverse party, and the appellant subsequently submits proof showing that the adverse party was served within the time required, the decision dismissing the appeal will be vacated and the case considered on its merits.

Della Lee Halloran, A-27433 (Supp.) (May 31, 1957)

Henry W. and Beatrice H. Luhmann, A-27941 (Supp.) (June 15, 1959)

Ervin Carl and Sadie V. Lembke, A-28015 (Supp.) (Oct. 5, 1959) 66 I. D. 345

Where a decision of the Director of the Bureau of Land Management indicates that there are adverse parties involved but fails to name them, an appellant from that decision is not required to serve such parties with copies of his notice of appeal.

The Dredge Corporation, A-27429 (Sept. 23, 1957) 64 I. D. 368

Where an appeal has been dismissed for failure of the appellant to serve an adverse party and he claims that he in fact served the adverse party and can submit proof of such service, he will not be called upon to furnish such proof where his appeal would have to be denied on the merits.

Raymond J. and Harold J. Hansen et al., A-27503 (Jan. 3, 1958)

RULES OF PRACTICE--Continued

APPEALS --Continued

Service on Adverse Party--Continued

Where on appeal to the Director, Bureau of Land Management, from a decision of an officer of the Bureau, the appellants fail to serve notice of their appeal on an adverse party named in the officer's decision, the appeal is properly dismissed.

Orian F. Campbell, Gladys C. Campbell, A-27648 (Apr. 8, 1958)

Where on appeal to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, the appellant fails to serve notice of his appeal on an adverse party named in the Director's decision, the appeal must be dismissed.

Muroc Land Company, A-27674 (June 23, 1958)

Appeals to the Secretary will be dismissed where the appellants fail to show that they have served copies of their notices of appeal upon adverse parties within the time allowed.

Leroy E. Cassou et al., A-27600 (Aug. 26, 1958)

Carl J. Richardson, A-27664 (Sept. 23, 1958)

United States v. Paul Allen et al., A-27676 (Oct. 27, 1958)

Beverly P. Robinson, A-27778 (Nov. 24, 1958)

Where an appeal to the Director is dismissed for failure to serve notice of the appeal on an adverse party, and on appeal to the Secretary the appellant submits proof indicating that he had filed proof of service on the adverse party with the Director but the proof appears to have been inadvertently lost, the decision dismissing the appeal will be reversed and the case remanded to the Bureau for consideration on its merits.

Duncan Miller, A-27688 (Oct. 6, 1958)

An appeal to the Director, Bureau of Land Management, is properly dismissed where the appellant fails to serve a copy of the notice of appeal on the adverse party in the case.

Patricia Ollgard Frazier, A-27886 (Dec. 5, 1958)

RULES OF PRACTICE--Continued

APPEALS --Continued

Service on Adverse Party--Continued

An appeal to the Secretary of the Interior will be dismissed where the appellant fails to show service of notice of the appeal or statement of reasons upon a party having an adverse interest.

Robert H. Wolff et al., A-27776 (Dec. 15, 1958)

An appeal to the Director, Bureau of Land Management, is properly dismissed where the appellant fails to serve a copy of the notice of appeal and the statement of reasons for the appeal on the adverse party named in the decision appealed from.

Dinver Pearson, A-27800 (Jan. 5, 1959)

Where an appeal to the Director is dismissed for failure to serve the notice of appeal and statement of reasons on the adverse party, and on appeal to the Secretary the appellant submits proof showing that the adverse party was served within the time required, the decision dismissing the appeal will be reversed and the case remanded to the Bureau for consideration on its merits.

Herbert H. Hilscher, A-27802 (Jan. 6, 1959)

United States v. George J. Patee et al., A-28147 (Dec. 22, 1959)

An appeal to the Director, Bureau of Land Management, is properly dismissed when the appellant does not serve his notice of appeal upon the adverse parties within the time required by the rules of practice but serves his notice of appeal later with his statement of reasons on the adverse parties.

Merriam T. George, A-27852 (Jan 29, 1959)

An appeal to the Secretary will be dismissed where the appellant has failed to serve notice of his appeal upon an adverse party within the time required by the rules of practice.

An appellant cannot excuse his failure to timely serve a person named as an adverse party with a notice of his appeal on the ground that the latter has been improperly designated as an adverse party.

United States v. William Barnett et al., etc., A-27869 (Mar. 27, 1959)

RULES OF PRACTICE--Continued

APPEALS--Continued

Service on Adverse Party--Continued

An appeal to the Secretary of the Interior will be dismissed where the appellant fails to serve a copy of his notice of appeal upon the adverse party named in the decision appealed from.

J. Fred Thomas, A-27974 (Mar. 31, 1959)

Norman B. Wolford, A-28129 (July 28, 1959)

An appeal to the Secretary will be dismissed where the appellants have not served a copy of their notice of appeal on the adverse parties although they have served their statement of reasons on such parties.

Henry W. Luhmann, Beatrice H. Luhmann, A-27941 (Mar. 31, 1959)

William D. Colburn, A-28235 (Nov. 13, 1959)

An appeal to the Secretary will be dismissed where the appellant fails to serve a copy of his notice of appeal and of his statement of reasons on an adverse party.

United States and Salt Lake City v. Wayne E. Watrous, A-27759 (May 15, 1959)

Ernest Bowen, A-28161 (Oct. 12, 1959)

An appeal to the Secretary of the Interior will be dismissed where the appellant has failed to serve notice of his appeal upon the adverse parties named in the Director's decision and it is immaterial that the manager's decision had not named adverse parties.

William Dittman, A-28097 (Oct. 30, 1959)

An appeal to the Secretary of the Interior will be dismissed when the appellant fails to show that he has served a copy of the notice of appeal upon the adverse party named in the decision appealed from.

Lee Davis Larsen, A-28112 (Dec. 30, 1959)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal

A person has no standing to appeal with respect to action taken on an oil and gas lease in which he has no present interest.

John J. Farrelly et al., A-27068 (Jan. 7, 1955) 62 I. D. 1

An appeal from a decision by an Examiner of Inheritance denying petitions for rehearing must be filed by a person aggrieved by the Examiner's decision, or by such person's attorney or representative, and where copies of an appeal were not furnished to the adverse parties as required by the probate regulations, the appeal will be dismissed.

Estate of Charles O'Brien, Unallotted Kikialus Indian, IA-142 (June 20, 1955)

The action of a prime contractor in filing a claim with the contracting officer on behalf of a subcontractor does not in itself suffice to ground an appeal to the Board of Contract Appeals that is subsequently taken by the subcontractor alone. A provision in a subcontract making the subcontractor subject to all the terms of the prime contract is insufficient to create privity of contract between the Government and the subcontractor, even though the prime contract provides also that all subcontracts shall be subject to the approval of the contracting officer.

Appeal of Young and Smith Construction Company, IBCA-151 (June 18, 1958) 65 I. D. 274

An order of a hearing examiner denying a motion to postpone a hearing is not an appealable order and the movant has no right to appeal from the denial of his motion.

United States v. Reed H. Parkinson, A-27714 (June 23, 1958) 65 I. D. 282

Any assignors as well as assignees are parties in interest to a decision which vacates in part prior decisions approving their assignment of oil and gas leases, and failure to include an assignor as a party in interest to such a decision by the Acting Director of the Bureau does not defeat the right of the assignor to appeal to the Secretary therefrom.

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

Where one who was not a party to a decision by the Acting Director of the Bureau of Land Management, but who should have been made a party to the decision, had notice of the decision and appealed therefrom to the Secretary, his appeal will be considered on its merits and a motion to dismiss the appeal because of the appellant's lack of standing as a party to the proceedings will be dismissed.

Godfrey Nordmark, A-27602 (July 21, 1958) 65 I. D. 299

Statement of Grounds

An appeal to the Secretary of the Interior from a decision of the Bureau of Land Management will be dismissed where the appellant fails to state any grounds upon which he contends that the decision is erroneous.

O. J. Bonnett, A-27036 (Feb. 11, 1955)

Hector Aitchison, A-27226 (Nov. 21, 1955)

United States v. Heirs of John W. Stockton, Deceased, A-27281 (May 4, 1956)

An appeal to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management will be dismissed where the notice of appeal fails to state the grounds upon which the appeal is based.

William C. Parson, A-27089 (April 12, 1955)

Patricia Sagers, A-27310 (May 14, 1956)

Constantine Androus et al., A-27351 (July 16, 1956)

A request for review of the action of an Examiner of Inheritance in approving the will of a deceased Indian will be denied in the absence of a tender of proof of matters germane to the issue.

Estate of Jeanette Ezekial, Deceased Nez Perce Allottee No. 1432, IA-643 (May 17, 1956)

RULES OF PRACTICE--Continued

APPEALS--Continued

Statement of Grounds--Continued

An appeal to the Secretary of the Interior will be dismissed where the appellant does not file a statement of reasons in support of his appeal within the time required by the revised rules of practice, effective May 1, 1956.

Gerhard Evenson, A-27383 (Sept. 11, 1956) 63 I. D. 331

George F. Hughes, A-27395 (Oct. 4, 1956)

An appeal to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management will be dismissed where the appellant fails to file a statement of reasons for the appeal within the time prescribed by the Department's rules of practice.

R. O. Haubelt, A-27406 (Nov. 13, 1956)

Daniel L. House et al., A-27419 (Nov. 13, 1956)

James A. Canning, Richard C. Hill, Jr., A-27407 (Feb. 7, 1957)

United States v. John E. and Bernice V. Peterson, A-27448 (Apr. 26, 1957)

William H. Pace, A-27483 (June 20, 1957)

Willard C. Rhoads, A-27610 (Apr. 2, 1958)

Moe Mandel, Kessel Rosenfeld, A-27629 (Apr. 2, 1958)

An appeal to the Secretary of the Interior will be dismissed where the appellant fails to file a statement of the reasons for the appeal within the time required by the Department's rules of practice.

Bernard Iriart, A-27412 (Nov. 13, 1956)

Ray O. Bowersox, A-27472 (May 27, 1957)

Matley Bros. et al., A-27486 (May 28, 1957)

When no grounds were established on which a motion for reconsideration could be sustained, the motion must be denied.

Appeal of Texas Construction Company and Hyde Construction Company, IBCA-73 (June 18, 1957)

RULES OF PRACTICE--Continued

APPEALS--Continued

Statement of Grounds--Continued

Where on appeal to the Director, Bureau of Land Management, from a decision of an officer of the Bureau, the appellant fails to file a statement of the reasons for the appeal within the period of time allowed by the rules of practice, the appeal is properly dismissed.

Charles J. Brady v. George M. Kitchen, A-27461 (June 26, 1957)

Where on appeal to the Director, Bureau of Land Management, from a decision of a manager of a land office the appellant files a statement of the reasons for the appeal with the land office manager, within the 30-day period required for filing the statement but the statement is not received by the Director until the 30-day period has expired, the appeal is properly dismissed since the pertinent rules of practice provide that a statement of reasons, if not filed with the notice of appeal, must be filed "in the office of the Director" within 30 days after the notice of appeal is filed.

Wilbert Phillips, Fletcher G. Edwards, A-27470 (Sept. 23, 1957) 64 I. D. 385

James V. A. Carter, A-27487 (Oct. 21, 1957)

An appeal to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, will be dismissed where the appellant fails to file a statement of reasons for the appeal.

William B. Jordan, A-27531 (Nov. 1, 1957)

Harry Tisor, A-27551 (Nov. 29, 1957)

Harvey S. Hale, A-27631 (Mar. 28, 1958)

Paul Albrecht, A-27656 (May 13, 1958)

Wyoming Minerals Corporation, A-27696 (June 23, 1958)

Muroc Land Company, A-27674 (June 23, 1958)

Eric W. Erickson et al., A-27579 (July 3, 1958)

Ann Pollard et al., A-27754 (Aug. 7, 1958)

E. C. Jensen and Sons, A-27803 (Oct. 21, 1958)

RULES OF PRACTICE--Continued

APPEALS--Continued

Statement of Grounds--Continued

An appeal to the Secretary of the Interior will be dismissed where the appellant fails to file any statement of the reasons for the appeal.

Charles L. Wallace et al., A-27506 (Dec. 12, 1957)

H. L. Stickney, A-27682 (June 23, 1958)

Carl Owen Hale, A-27736 (Aug. 7, 1958)

Anthony Ryczkowski, A-27721 (Aug. 7, 1958)

Eugene S. Gates, A-27698 (Sept. 11, 1958)

Karl and Mae Bradshaw, A-27762 (Sept. 11, 1958)

James P. Whitmer, Henry Casperson, A-27820 Oct. 29, 1958)

Roy W. Cook, Duncan Miller, A-27720 (Nov. 7, 1958)

United States v. J. W. Shireman et al., A-27504 Nov. 12, 1958)

Louise W. Church, A-27839 (Jan. 14, 1959)

Louis E. Nassau, Mrs. Celia B. Waterman, A-27935 (Mar. 4, 1959)

Estate of Regina Eastburn, A-27960 (Mar. 6, 1959)

J. W. McTiernan, A-27964 (Apr. 24, 1959)

State of Louisiana, A-27966 (May 4, 1959)

John F. Deeds, A-27834 (May 15, 1959)

Donald R. Wheeler et al., A-27927 (June 15, 1959)

Richard C. Hoefle, A-28047 (June 16, 1959)

Clark F. Dickson, A-27995 (June 29, 1959)

H. T. Birr, III, et al., A-27947 (July 23, 1959)

Malcolm C. Petrie, A-28117 (Aug. 17, 1959)

Ernest Bowen, A-28161 (Oct. 12, 1959)

Harry A. Hall, A-28186 (Oct. 30, 1959)

Harly E. Harty, A-28247 (Nov. 13, 1959)

Clifford Sanderson, A-28122 (Nov. 23, 1959)

Robert Bruce Sandstrom, A-28259 (Dec. 18, 1959)

Jean and Joyce Morcom, A-28242 (Dec. 22, 1959)

RULES OF PRACTICE--Continued

APPEALS--Continued

Statement of Grounds--Continued

Where the rules of practice provide that a statement of the reasons for an appeal, if not filed with the notice of appeal, must be filed in the office of the Director, Bureau of Land Management, within 30 days after the notice of appeal is filed, an appeal is properly dismissed if the statement of reasons is filed in a land office, is forwarded to the Director, but is not received in the office of the Director until after the 30-day period has expired.

Vincent Cuccia, George E. Conley, A-27484 (Mar. 19, 1958)

Earl H. Smith et al., A-27708 (Sept. 22, 1958)

An appeal to the Director, Bureau of Land Management, is properly dismissed where the appellants fail to file a statement of the reasons for the appeal in the office of the Director within the time allowed by the Department's rules of practice.

Vincent Cuccia, George E. Conley, A-27484 (Mar. 19, 1958)

Earl H. Smith et al., A-27708 (Sept. 22, 1958)

Thomas A. Spofford, A-27738 (Oct. 23, 1958)

An appeal to the Director of the Bureau of Land Management is properly dismissed where the appellant files his statement of reasons after the date on which it is due.

United States v. E. V. Pressentin et al., A-27495 (Apr. 2, 1958)

Alaska Oil and Gas Development Company, A-27792 (Dec. 9, 1958)

An appeal to the Director, Bureau of Land Management, from a decision of an officer of the Bureau is properly dismissed where the appellant fails to file a statement of the reasons for the appeal.

Arthur M. Lelles, A-27678 (Apr. 30, 1958)

Grace Nelson, A-27828 (Oct. 24, 1958)

RULES OF PRACTICE--Continued

APPEALS--Continued

Statement of Grounds--Continued

Where an appeal is taken to the Secretary from a decision of the Director of the Bureau of Land Management, it is incumbent on the appellant to state reasons why he believes the Director's decision to be erroneous.

Renz L. Jennings, A-27589 (June 25, 1958)

Where an appellant states merely that there has been an erroneous interpretation of the law, without pointing out wherein the decision appealed from is believed to be erroneous, the appellant has failed to state reasons for his appeal, as required by the rules of practice, and the appeal will be dismissed.

Duncan Miller, A-27624 (July 14, 1958) 65 I. D. 290

Duncan Miller, Leland K. Whittier et al., A-27623 (July 28, 1958)

Duncan Miller, A-27715-A (Aug. 6, 1958)

Franco Western Oil Company et al., A-27607 (Aug. 11, 1958) 65 I. D. 316

Where on appeal to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, an appellant states merely that he believes the decision appealed from is erroneous and that the question presented should be finally determined by the Secretary of the Interior, the appellant has failed to state the reasons for his appeal and the appeal will be dismissed.

R. M. Young, Jr., A-27753 (Aug. 15, 1958)

An appeal to the Director or to the Secretary of the Interior will be dismissed where the appellant fails to file a statement of the reasons for the appeal within the time required by the rules of practice.

Duncan Miller, A-27673 (Aug. 29, 1958) 65 I. D. 380

RULES OF PRACTICE--Continued

APPEALS--Continued

Statement of Grounds--Continued

A mere statement by an appellant that his application was rejected by an erroneous interpretation of law, without more, is insufficient to constitute a statement of reasons for his appeal.

Duncan Miller, A-27673 (Aug. 29, 1958)
65 I. D. 380

Roy W. Cook, Duncan Miller, A-27720 (Nov. 7, 1958)

Where the rules of practice provide that a statement of reasons for an appeal, if not filed with the notice of appeal, must be filed in the office of the Director, Bureau of Land Management, within 30 days after the notice of appeal is filed, an appeal is properly dismissed if the statement of reasons is filed within the 30-day period with the hearing examiner from whom the appeal is taken, is forwarded to the Director, but is not received in the office of the Director until after the 30-day period has expired.

United States v. Howard W. Johnson, A-27699 (Sept. 15, 1958)

An appeal to the Director, Bureau of Land Management, is properly dismissed where a statement of reasons for the appeal is not filed with the notice of appeal, but is later filed in the office of the manager, is forwarded to the Director, but is not received in the office of the Director until after the 30-day period allowed by the rules of practice for the filing of a statement of reasons, if not filed with the notice of appeal, has expired.

John Figi, A-27709 (Sept. 22, 1958)

Charles B. Webster et al., A-27780 (Dec. 8, 1958)

Charles B. Webster et al., A-27780 (Supp.) (Jan. 29, 1959)

An appeal to the Director, Bureau of Land Management, is properly dismissed where the appellant fails to file a statement of the reasons for his appeal within the time allowed by the Department's rules of practice.

Clarence E. Hiles, A-27739 (Oct. 23, 1958)

Harry P. Carlyle, A-27811 (Jan. 8, 1959)

T. H. McElvain, Forrest B. Miller, A-27912 (May 29, 1959)

RULES OF PRACTICE--Continued

APPEALS--Continued

Statement of Grounds--Continued

Where an appellant files nothing in support of his appeal to the Secretary except a miscellany of irrelevant photographs, his appeal will be dismissed because of his failure to file a statement of reasons for the appeal.

Ronald Klein, A-27771 (Nov. 19, 1958)

An appeal to the Director, Bureau of Land Management, is properly dismissed where the appellant fails to file a statement of the reasons for his appeal.

Alva D. Lawler, A-27801 (Jan. 6, 1959)

Mickey E. Calvano, A-27816 (Jan. 8, 1959)

Lora Ione Bloomster, A-27938 (May 29, 1959)

If a timely notice of appeal from findings of fact of a contracting officer, when considered with the documents referred to therein and contained in the appeal file, states with sufficient particularity the grounds of the appeal, a Government motion to dismiss the appeal because the contractor failed to file on time a brief in support of the appeal will be denied. However, in view of the failure of the contractor to reply to the motion to dismiss or offer any excuse for the tardy filing of the brief, the Board will disregard the brief in support of the appeal.

Appeal of Flora Construction Company, IBCA-180 (Mar. 2, 1959)

Where an appellant states in effect merely that the decision appealed from is erroneous, the appellant has failed to state reasons for his appeal, as required by the rules of practice, and the appeal will be dismissed.

Duncan Miller, A-27893 (Mar. 5, 1959)

Under the regulations applicable to contract appeals, a notice of appeal need not state the reasons why the decision appealed from is deemed erroneous, provided such reasons are stated in the supporting brief authorized by the regulations.

Appeal of Henly Construction Company, Inc., IBCA-165 (Mar. 18, 1959)

RULES OF PRACTICE--Continued

APPEALS--Continued

Statement of Grounds--Continued

An appeal to the Secretary of the Interior will be dismissed where the appellant does not file his statement of reasons for the appeal until long after the date upon which it is due.

J. Fred Thomas, A-27974 (Mar. 31, 1959)

An appeal to the Secretary will be dismissed where the appellants fail to file any statement of reasons for the appeal although it appears from an answer filed by adverse parties that a statement of reasons was served on such parties.

Henry W. Luhmann, Beatrice H. Luhmann, A-27941 (Mar. 31, 1959)

An appellant's statement that he believes that the record shows that he is entitled to the lease applied for is not a sufficient specification of error to constitute the statement of reasons for an appeal required by the rules of practice and the appeal is properly dismissed.

Duncan Miller, A-27913 (May 4, 1959)

A statement of reasons for an appeal which does no more than to charge or suggest that the decision appealed from contains a mistake or mistakes of law or of fact and that it is not supported by the evidence is not a sufficient specification of error to constitute the statement of reasons for an appeal required by the rules of practice and the appeal is properly dismissed.

United States and Salt Lake City v. Wayne E. Watrous, A-27759 (May 15, 1959)

Where on appeal to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, an appellant does not allege that the Director's decision is erroneous but merely desires that the question presented should be determined to deter a future adverse ruling on the question, the appellant has failed to state proper reasons for his appeal and the appeal will be dismissed.

Ted P. Stockmar, A-27945 (Jun. 12, 1959)

RULES OF PRACTICE--Continued

APPEALS--Continued

Statement of Grounds--Continued

An appeal to the Secretary of the Interior will be dismissed where the appellant does not file his statement of reasons until after the date on which it is due.

James C. Jeskey, A-28036 (Jun. 15, 1959)

Larry O. Poage, Hubert L. Poage, A-28025 (June 15, 1959)

United States v. Roland A. Labbe, A-28064 (July 16, 1959)

James M. and Winnie E. Smith, A-28084 (Aug. 17, 1959)

Where an appeal to the Secretary is dismissed on the ground that the appellant failed to file any statement of reasons for the appeal, and a further search of the Department's records discloses that a statement of reasons was in fact timely filed, the appeal should not be dismissed and will be considered upon its merits.

Henry W. and Beatrice H. Luhmann, A-27941 (Supp.) (Jun. 15, 1959)

An appeal to the Director, Bureau of Land Management, is properly dismissed for failure of the appellants to file a statement of reasons for their appeal as required by the rules of practice where the appellants state in their appeal only that they are appealing merely as a matter of form and give no further reasons for their appeal.

Douglas Robert Wright et al., A-27991 (Jul. 17, 1959)

An appeal to the Director is improperly dismissed for failure to assign any "specification of error" where the statement of reasons for the appeal sets out the reasons why the appellant thinks the decision appealed from is wrong, even though as a matter of law the decision appealed from is correct.

Leonard R. Pollard, A-27982 (July 31, 1959)

An appeal to the Director of the Bureau of Land Management is properly dismissed when the appellant files a statement of the reasons for his appeal within the 10-day grace period allowed by the Department's rules of practice but did not mail the statement until after the expiration of the 30-day period within which the statement was required to be filed.

Paul E. Brand, A-28079 (Oct. 15, 1959)

RULES OF PRACTICE--Continued

APPEALS--Continued

Statement of Grounds--Continued

A statement of reasons for an appeal by a junior offeror for an oil and gas lease which charges that the land office failed to show that a conflicting senior offer for an oil and gas lease was proper in all respects is not a sufficient specification of error to constitute the statement of reasons required by the rules of practice and the appeal is properly dismissed.

Duncan Miller, A-28063 (Oct. 26, 1959)

An appeal to the Secretary of the Interior will be dismissed where the appellant does not mail his statement of reasons until after the date on which it is due, even though it is received within the 10-day grace period provided in 43 CFR, 1954 Rev., 221.92(b) (Supp.).

Francis J. Burns, A-28257 (Dec. 1, 1959)

Timely Filing

An appeal to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management will be dismissed where the notice of appeal was not filed with the Director within the time allowed by the Department's rules of practice.

Robert Dale Scarrow, A-27023 (Jan. 11, 1955)

Margaret Gruber, Camilo Esparza, Jr., State of Nevada, A-27036 (Feb. 11, 1955)

O. J. Bonnett, A-27036 (Feb. 11, 1955)

Bernice E. Kincaid, A-27043 (Mar. 18, 1955)

James M. Stoos, A-27042 (Mar. 23, 1955)

Len Everett, A-27050 (Mar. 23, 1955)

William E. Gelder, A-27084 (Apr. 12, 1955)

State of Utah, Kearns Corporation, A-27091 (Apr. 13, 1955) 62 I. D. 141

John A. Donnell, A-27118 (May 11, 1955)

Albert N. Froom, A-27124 (May 23, 1955)

Martha Lee Starns, Administratrix, Estate of Laurence S. Starns, Deceased, A-27185 (June 23, 1955)

Paul L. Smith, A-27176 (Sept. 22, 1955)

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

An appeal to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management will be dismissed where the notice of appeal was not filed with the Director within the time allowed by the Department's rules of practice. (Continued from preceding column.)

Evelyn Adams Lyon, A-27245 (Dec. 28, 1955)

Charles F. and Charles P. McCuskey, A-27247 (Jan. 20, 1956) 63 I. D. 22

Fred Glenn, Jr., A-27253 (Feb. 6, 1956)

Ralph E. Irving et al., A-27274 (Feb. 20, 1956)

Duncan Miller, A-27279 (Apr. 19, 1956)

Lee Ormiston, A-27355 (May 14, 1956)

Carl V. Giem, Harvey Bros., Interveners, A-27299 (May 31, 1956)

D. Miller, A-27343 (July 3, 1956)

Lloyd R. Hill, C. C. Grove, A-27379 (July 16, 1956)

Isaac A. Himes, A-27423 (Nov. 26, 1956)

Andrew T. Johnson et al., A-27305 (Sept. 25, 1957)

Beverly P. Robinson, A-27778 (Nov. 24, 1958)

Norman B. Wolford, A-28129 (July 28, 1959)

A petition for the reopening of an Indian heirship proceeding more than 25 years after the Department had determined the heirs of the Indian decedent, must be denied on the ground it was not submitted within the period of time prescribed in the departmental regulations.

Estates of Susan Wilson Marshall, Umpqua Allottee No. 11-S - And - Dummy, Coos Bay Allottee No. 131, IA-129 (Feb. 15, 1955)

A petition for the reopening of an Indian heirship proceeding more than thirty-nine years after the Department had determined the heirs of the Indian decedent, must be denied on the ground it was not submitted within the period of time prescribed in the Departmental probate regulations.

Estate of William Slow, Lower Yanktonai Sioux Allottee No. 831, IA-246 (April 4, 1955)

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

An appeal to the Secretary of the Interior which is filed in a land office of the Bureau of Land Management within the 30 days allowed by the rules of practice of the Department for the taking of appeals to the Secretary but which does not reach the office of the Director of the Bureau of Land Management at Washington until after the expiration of the 30-day period is not timely filed and will be dismissed.

R. L. Greene et al., A-27181 (May 11, 1955)

Chester L. Clymer, A-26992 (Sept. 29, 1955)

David R. Daniel, Melvin R. Taylor, A-27335 (July 16, 1956)

Andrew T. Johnson et al., A-27305 (Sept. 25, 1957)

Under the present regulations and practice, the Director of the Bureau of Land Management may accept late appeals from a decision of the manager of a land office.

Leo W. Winter, A-27097 (May 25, 1955)

A petition for the reopening of an Indian heirship proceeding more than 28 years after the Department has determined the heirs of the Indian decedent must be denied on the ground it was not submitted within the period of time prescribed in the departmental probate regulations.

Estate of Blue Bug, Fort Berthold Allottee No. 434, IA-174 (June 20, 1955)

A petition for the reopening of an Indian heirship proceeding more than 42 years after the Department had determined the heirs of the Indian decedent, must be denied on the ground it was not submitted within the period of time prescribed in the departmental probate regulations.

Estate of Smoky Jim, Burns Allottee No. 34, IA-148 (June 20, 1955)

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

A petition for rehearing filed in the estate of a deceased Indian which seeks to modify the inventory of the estate and exclude property acquired by the decedent by inheritance in probate proceedings completed 17 years earlier, is properly treated as a petition to reopen the earlier proceedings, and will be denied when it is not timely filed under the regulations applicable to reopening the earlier proceedings.

Estate of Abbie McDonald Kemble LeClair, Deceased Ponca Allottee No. 491, IA-488 (Aug. 25, 1955) 62 I. D. 337

An appeal to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management which is filed in a land office of the Bureau of Land Management after the 30-day period allowed by the rules of practice of the Department for the taking of appeals to the Secretary is not timely filed and will be dismissed.

Frank A. Porter, A-27222 (Nov. 17, 1955)

An appeal to the Secretary of the Interior which is filed in a district grazing office of the Bureau of Land Management within the 30 days allowed by the rules of practice of the Department for the taking of appeals to the Secretary but which does not reach the office of the Director of the Bureau of Land Management at Washington until after the expiration of the 30-day period is not timely filed and will be dismissed.

Claude Arrington, A-27224 (Nov. 21, 1955)

An appeal to the Secretary of the Interior will be dismissed where it was not filed within the time required by departmental regulation.

John C. Sanborn et al., A-27218 (Dec. 12, 1955)

Maurice Davis, A-27198 (Jan. 5, 1956)

An appeal to the Secretary from a decision by the Director of the Bureau of Land Management will be dismissed where it is not filed

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

within 30 days after service of a copy of the Director's decision upon the appellant.

Curtis D. Wheeler, A-27275 (Mar. 27, 1956)

Patricia Sagers, A-27310 (May 14, 1956)

Leo and Imogene Fagan, A-27304 (May 14, 1956)

George D. Palin, A-27347 (May 14, 1956)

Alfonso Leto, A-27319 (May 14, 1956)

Under a Government contract that contains the usual form of "disputes" clause, providing that decisions of the contracting officer concerning questions of fact arising under the contract shall be final and conclusive unless appealed from within 30 days, an appeal from a decision of the contracting officer must be dismissed if the notice of appeal was not mailed or otherwise furnished to the contracting officer within the 30 days allowed by the contract.

Appeal of Emsco Manufacturing Company, IBCA-66 (Apr. 6, 1956) 63 I. D. 92

An appeal to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management will be dismissed where the appeal is not filed with the Director within the 30-day period allowed by the Department's rules of practice for the taking of appeals to the Secretary.

Leslie Ardell Silliman, Lester Elden Clement et al., A-27255, A-27302 (May 31, 1956)

Appeal of a native townsite trustee's deed of certain lots in the townsite of Wrangell, Alaska, to a non-native may be dismissed on the ground that an appeal 14 years after the action complained of is not presented within a reasonable time.

Ownership of Lots 15 and 16, Block 84, in the Townsite of Wrangell, Alaska, M-36355 (June 27, 1956)

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

An appeal to the Director of the Bureau of Land Management from a decision of the manager of a land office which is filed with the Director after the 30-day period allowed by the rules of practice applicable to Government contests against mining claims is not timely filed and the Director's action in dismissing such an appeal is proper.

United States v. Harry A. Schultz and Susann Schultz, A-27296 (June 27, 1956)

Where an appeal to the Secretary is filed late but the appeal is in reality a continuation of a proceeding which was previously before the Secretary on appeal and was remanded to the Bureau of Land Management for further investigation and action, the sanction of summary dismissal for a late appeal need not be invoked and the appeal may be considered on the merits.

George and John Arkoosh, Vivian Bahr, A-26988 (Supp.) (Aug. 14, 1956)

An appeal to the Secretary of the Interior from the decision of an Examiner of Inheritance denying a petition for rehearing, under the regulations prescribing a time limit within which such appeals may be filed cannot receive consideration if the appeal was not filed within the time prescribed by the regulations or an extension thereof granted by the Secretary of the Interior.

Estate of Jack (Jacque) Naylor, Yakima Allottee No. 4523, IA-623 (Sept. 5, 1956)

Under a Government contract that contains the usual form of "disputes" clause, an appeal from a decision of the contracting officer must be dismissed if the notice of appeal was not mailed or otherwise furnished to the contracting officer within the 30 days allowed by the contract. The Board has no authority to waive this limitation or otherwise extend the 30-day period.

The timeliness of an appeal is governed by the time that elapsed between the date when the findings of fact and decision were received by the contractor and the date when the notice of appeal was mailed to the contracting officer, and not by the time that elapsed between the date when the findings of fact and decision were received by a subcontractor for whose benefit the contractor is prosecuting the appeal and the date when the appeal papers were mailed to the contractor by the subcontractor.

Appeal of Wiscombe Painting Company, IBCA-78 (Oct. 26, 1956)

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

Under a Government contract which provides for the taking of an appeal within 30 days, but does not specify with particularity either the event that starts or the event that stops the running of this period, the time for appeal begins to run when the contractor actually receives its copy of the decision of the contracting officer, and an appeal that is not mailed by the contractor until more than 30 days after the receipt of such copy is not timely and must be dismissed for lack of jurisdiction.

Appeal of Bennett Industries, Inc., 1BCA-102 (Apr. 23, 1957) 64 I. D. 113

The provisions of the "disputes" clause of the standard forms of Government contracts are jurisdictional, and preclude review of the contracting officer's decisions upon questions of fact arising under the contract unless an appeal is taken within the 30 days allowed for that purpose by the "disputes" clause. The Board of Contract Appeals has no authority to waive this limitation or otherwise extend the 30-day period.

Appeal of Westinghouse Electric Supply Company, 1BCA-107 (July 30, 1957)

Where under the Department's rules of practice a document is required to be filed in the office of the Director, Bureau of Land Management, the document is not considered filed until such time as it is actually received in the Director's office, and a document filed in a land office is not considered filed in the office of the Director.

Wilbert Phillips, Fletcher G. Edwards, A-27470 (Sept. 23, 1957) 64 I. D. 385

James V. A. Carter, A-27487 (Oct. 21, 1957)

Where a document is required to be filed in the office of the Director, Bureau of Land Management, within a certain period of time and the document is received in the Secretary's Mail Center on the last day of the time allowed, but is not forwarded to the office of the Director until after the time allowed has elapsed, the mail center will be deemed to have been the agent of the Director for receipt of the document and the document will be considered as filed on time.

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

Where under the mail delivery procedure of the Department registered documents for all bureaus, except the Geological Survey, are delivered to the Secretary's Mail Center and receipted there, the mail center acts as agent for the bureaus, and a registered document delivered to the mail center is deemed to be filed in the office to which it is addressed on the date delivery is made to the mail center.

Duncan Miller, A-27466 (Sept. 24, 1957)

A notice of appeal to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management which is mailed on the thirty-first day after receipt of the Director's decision from which the appeal is taken will not permit waiver of the rule for timely filing even though the appeal is received within the 10-day period of grace stipulated in 43 CFR 221.92(b) and will be dismissed.

H. L. Stickney, A-27765 (Aug. 26, 1958)

The late filing of a statement of reasons for an appeal to the Secretary of the Interior cannot be waived where the record shows that the statement was not mailed to the Secretary until after the expiration of the period of time within which the statement was required to be filed, even though the statement was received within the 10-day period of grace stipulated in 43 CFR 221.92(b).

Duncan Miller, A-27673 (Aug. 29, 1958) 65 I. D. 380

United States v. Roland A. Labbe, A-28064 (July 16, 1959)

James M. and Winnie E. Smith, A-28084 (Aug. 17, 1959)

The late payment of a filing fee on an appeal to the Secretary of the Interior cannot be waived where the record shows that the filing fee was not mailed to the Secretary until after the expiration of the period of time within which the filing fee was required to be paid, even though the fee was received within the 10-day period of grace stipulated in 43 CFR 221.92(b).

Christian G. Wieger, A-27680 (Sept. 29, 1958) 65 I. D. 402

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

Where, in an appeal to the Director, Bureau of Land Management, the appellants telegraphed a request for an extension of time within which to file a statement of reasons in support of their appeal on the last day of the period within which a statement of reasons was required to be filed, and because of circumstances beyond the control of the appellants the request was not delivered to the Bureau until after the office hours provided by the regulation for the filing of documents, the request for extension may be considered as timely filed and the appeal need not be summarily dismissed.

United States v. George J. Patee et al., A-27694 (Oct. 30, 1958)

An appeal to the Director of the Bureau of Land Management from a hearing examiner's decision is properly denied where the notice of appeal was not filed within the time required by the Department's rules of practice.

United States v. Bunno E. Matsen, A-27712 (Nov. 10, 1958) 65 I. D. 453

An appeal to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, will be dismissed where the appellants fail to transmit notices of appeal or filing fees within the 30-day period required by the rules of practice of the Department although the notices of appeal and filing fees are received within the 10-day grace period.

Edwin Roy Hastings, A-27831 (Nov. 13, 1958)

An appeal to the Secretary of the Interior from a decision by an Examiner of Inheritance denying a petition for rehearing on a deceased Indian's estate will not be favorably considered where such appeal was not filed within the time prescribed by the Departmental probate regulations, and the estate has been distributed.

Estate of Julia Long Cat Big Charger Ghost Bear, Pine Ridge Sioux Allottee No. 6881, IA-867 (Nov. 14, 1958)

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

A notice of appeal to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management which is mailed after the end of the thirty-day period following receipt of the Director's decision from which the appeal is taken will not permit waiver of the rule for timely filing even though the appeal is received within the ten-day period of grace stipulated in 43 CFR 221.92(b), and the appeal will be dismissed.

William G. Tauscher, Andrew F. Taylor, A-27878 (Mar. 5, 1959)

When the 15-day period prescribed for the filing of a supporting brief addressed to the Board of Contract Appeals expires on a Sunday, the contractor has until the following day to complete the filing with the Board.

Appeal of Henly Construction Company, Inc., IBCA-165 (Mar. 18, 1959)

An appeal to the Secretary of the Interior will be dismissed if the notice of appeal is not filed or the filing fee paid within the period prescribed by the Department's rules of practice.

Ollie W. Brooks, A-27856 (Mar. 30, 1959) 66 I. D. 108

A contracting officer's findings that the drawings submitted to bidders and incorporated in the executed contract contained data from which in about 2 hours' time a qualified person could prepare an estimate of quantity which would have revealed that the material to be excavated did not exceed the quantity that was ultimately removed, deals with technical engineering questions which are essentially questions of fact under the "disputes" clause of the standard form of Government construction contract. Hence, an appeal from such findings must be taken within 30 days from receipt of the findings.

When the 30th or last day on which an appeal may be taken from findings of fact under the "disputes" clause falls on a State holiday not declared by the Congress to be a legal public holiday, the time for taking the appeal is not extended to the next business day.

Appeal of Bushman Construction Company, IBCA-193 (Apr. 23, 1959) 66 I. D. 156

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

A statement of reasons for an appeal which is mailed on the 31st day after the filing of the notice of appeal will not permit waiver of the rule for timely filing even though such statement is received within the 10-day period of grace stipulated in 43 CFR 221.92(b), and the appeal is properly dismissed.

Lucille Ethel Cruz et al., A-27931 (May 21, 1959)

The late filing of a statement of reasons for an appeal to the Director of the Bureau of Land Management cannot be waived where the record shows that the statement of reasons was not mailed to the Director until after the expiration of the period of time within which the statement was required to be filed, even though the statement was received within the 10-day period of grace stipulated in 43 CFR 221.92(b).

T. H. McElvain, Forrest B. Miller, A-27912 (May 29, 1959)

A petition for rehearing and appeal filed in the case of a deceased Indian which seeks to modify the inventory of the estate and to exclude property acquired by the decedent in probate proceedings completed 17 years earlier, is in effect an attempt to reopen the earlier proceedings, and will be denied when it is not timely filed under the regulations applicable to reopening the earlier proceedings.

Estate of Helen White Coat Elk Nation, IA-856 (Jun. 17, 1959)

Under the rules governing procedure before the Board of Contract Appeals a request for reconsideration that is mailed within the period allowed for the filing of such requests, but that is not delivered until after the end of that period, is not timely.

Appeals of Inter-City Sand and Gravel Co. and John Kovtynovich, IBCA-128 (Aug. 27, 1959) 66 I. D. 313

An appeal to the Director of the Bureau of Land Management is properly dismissed when the appellant files a statement of the reasons for his appeal within the 10-day grace period allowed by the Department's rules of practice but did not mail the statement until after the expiration of the 30-day period within which the statement was required to be filed.

Paul E. Brand, A-28079 (Oct. 15, 1959)

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

An appeal to the Director of the Bureau of Land Management from a manager's decision was properly rejected where it was not filed within the time required by the Department's rules of practice.

J. S. Thompson, R. D. Laird, A-28098 (Oct. 29, 1959)

An appeal to the Secretary of the Interior will be dismissed where the appellant does not mail his statement of reasons until after the date on which it is due, even though it is received within the 10-day grace period provided in 43 CFR, 1954 Rev., 221.92(b) (Supp.).

Francis J. Burns, A-28257 (Dec. 1, 1959)

An appeal to the Secretary of the Interior from a decision by an Examiner of Inheritance denying a petition for rehearing to consider a claim against a deceased Indian's estate will not be entertained when such appeal was not filed within the time specified under the Departmental probate regulations.

Estate of Coffee No. 2, Rosebud Sioux Allottee No. 3646, IA-926 (Dec. 18, 1959)

EVIDENCE

In a case of disputed heirship to an Indian's estate, the finding of an Examiner of Inheritance, which is supported by the best available evidence, and which is in accord with the Departmental probate records, will not be disturbed.

Estate of Joshua Comes Out, IA-209 (Mar. 10, 1955)

Testimony essential to a proper determination of the question whether a deceased Indian was competent to make his will and whether he was subjected to undue influence should be obtained. This would include the testimony of two attesting witnesses to the will, one of whom was also the scrivener of that instrument.

Estate of Clemente Segundo, IA-136 (April 5, 1955)

RULES OF PRACTICE--Continued

EVIDENCE--Continued

The issuance of a trust patent for an Indian allotment carries with it a presumption of proper performance as well as the implied finding of every fact made a prerequisite to the patent's issue. Held, an allotment of land to an Indian is presumed to have been regularly made and will not be set aside after 37 years in the absence of clear evidence of mistake.

Placid Oil Company, IA-153 (May 27, 1955)

It has always been the practice of the Department, except in contest proceedings, to permit an appellant, at various stages of his appeal, to submit documentary evidence in support of his appeal.

Leonard E. Noren, Harry C. Perry, A-27147 (Aug. 1, 1955)

The deposit in the mails of a notice of appeal enclosed in an envelope that is properly addressed, and has stamps for the correct amount of postage affixed, creates a rebuttable presumption of fact that the notice of appeal is delivered to its destination in the ordinary course of the mails.

The date borne by a notice of appeal is not proof that it was actually mailed on that date.

The postmark on the envelope in which a notice of appeal was received is evidence that the envelope and its contents passed through the mails at the time and place stated in the postmark, and is a circumstance from which the date when the notice of appeal was first deposited in the mails may legitimately be inferred by the trier of the fact.

Appeal of Emsco Manufacturing Company, IBCA-66 (Apr. 6, 1956) 63 I. D. 92

Before taking action on the will of a deceased Indian proof must be submitted as to the testamentary capacity of the decedent to execute the will and the circumstances surrounding its execution. Held, that the proof submitted at the probate hearing coupled with affidavits accompanying a petition for rehearing justify the remanding of the proceedings for a rehearing by the Examiner of Inheritance concerning the testamentary capacity of the decedent to execute the will.

Estate of Annie Seth Corbett Miller, IA-748 (Aug. 13, 1956)

RULES OF PRACTICE--Continued

EVIDENCE--Continued

Where a probate record on the contest of an Indian decedent's will was incomplete because essential information from persons attending the execution of the will had not been obtained, and where upon rehearing it is established by the attesting witnesses, including the scrivener of the will, and by other proof that the decedent was competent to make his will and that he was not subjected to undue influence, the will is an instrument which should be approved.

Estate of Clemente Segundo, IA-136 (Supp.) (Aug. 24, 1956)

A bare assertion by the contractor of certain causes of delay without supporting evidence is insufficient to meet the burden of establishing a valid claim or to demonstrate the error of the contracting officer.

Appeal of Zinsco Electrical Products, IBCA-104 (June 3, 1957)

Where, on appeal to the Secretary, a question of fact is presented as to whether or not the cancellation of an oil and gas lease was noted in the official tract book by means of lines drawn through the serial number of the lease, the name of the lessee, and the description of the land in the lease prior to the filing of an oil and gas lease offer for the same land, and the evidence in the record is conflicting and inconclusive, the case will be remanded to the Bureau of Land Management to make a further investigation and to allow the parties an opportunity to submit additional evidence on the question of fact.

John Snyder, A-27445 (Sept. 9, 1957) 64 I. D. 353

The burden of proving that a greater quantity of excavation was performed than the Government concedes is on the contractor who makes this contention. On the other hand, the burden of proving that the contractor did not properly set turnout structures to the lines and grades contemplated rests on the Government.

Appeal of D. R. Haddox, IBCA-84 (Supp.) (Oct. 18, 1957)

When the contractor has not met the burden imposed on it of establishing by substantial evidence the validity and amounts of its claims based on the "changed conditions" or "extras"

RULES OF PRACTICE--Continued

EVIDENCE--Continued

provisions of the contract, an appeal from adverse decisions of the contracting officer must be denied. Specifically, the contractor has the burden of proving that the contracting officer was wrong in concluding that a proper site investigation would have enabled a reasonably prudent and experienced contractor to have anticipated the conditions encountered. Ordinarily, statements in claim letters are not sufficient proof of essential facts which are disputed.

Appeal of AAA Construction Company, IBCA-55 (Nov. 26, 1957) 64 I. D. 440

To invalidate a will for lack of testamentary capacity, evidence must show condition to exist at the time of the execution of the will.

Estate of Martha DeRoin, Osage Allottee No. 417, IA-874 (Nov. 27, 1957)

In determining whether a mining claim is a valid claim, evidence detrimental to the contestee produced at the hearing through the examination and cross-examination of the contestee's witnesses may be considered.

United States v. Everett Foster et al., A-27421 (Jan. 8, 1958) 65 I. D. 1

Notwithstanding certain irregularities incident to the witnessing of an Indian decedent's will, additional proceedings are required where the record contains other proof tending to attest to the validity of the will and indicating that a petition for rehearing from an order of an Examiner of Inheritance disapproving the will should have been served upon the adverse parties for answer and possibly a further hearing before action was taken on the petition for rehearing.

Estate of Ortego Lopez, IA-860 (Apr. 4, 1958)

Where the evidence upon which an Examiner of Inheritance determined the heirs of a deceased Indian is conflicting and it appears that essential testimony may be available which has not been obtained, the case will be remanded for a further hearing.

Estate of John Musmustoo, Deceased Yakima Allottee No. 3516, IA-712 (May 28, 1958) 65 I. D. 289

RULES OF PRACTICE--Continued

EVIDENCE--Continued

Claims of a contractor engaged in the construction of two substations for the Bonneville Power Administration based on charges of misconduct of the inspectors in supervising the work must be rejected when (1) the evidence in support of the claims is extremely stale; (2) the contractor in appealing has not requested a hearing at which the witnesses with knowledge of the events could be heard and subjected to cross-examination; (3) the top officials of Bonneville who were aware of the contractor's charges visited the site of the work for the purpose of investigating the charges, and after investigation found them to be groundless; (4) there is independent evidence of the good character and competence of the inspectors; (5) there were numerous shortcomings in the performance of the contractor's work that might have motivated his countercharges; (6) the charges are based on misunderstandings of the situations from which they arose; and, finally, (7) the charges run counter to inherent probabilities and are otherwise not credible.

Appeal of W & W Company, IBCA-54 (Aug. 4, 1958)

Under a contract for the clearing of a transmission line right-of-way within a national forest which provides that the contractor shall pay "suppression costs and damages resulting from any fires caused by his operations," a claim by the Government for payment of such costs and damages is allowable when the fact that the fire was caused by the contractor's operations is established by a preponderance of the evidence. Evidence showing that the fire started at a place where smoking would have been particularly dangerous and would probably have resulted in the immediate discharge of an employee detected in so doing, that a group of the contractor's employees ate lunch extremely close to this place within approximately 30 minutes before the discovery of the fire, that one of these employees was an habitual smoker, that following the lunch period this employee had a clear opportunity for undetected smoking at the place where the fire started, that the possibility of the fire having been started by occurrences other than smoking was remote, that the possibility of persons other than the contractor's employees having been sufficiently close in point of time and distance to have started the fire was likewise remote, and that the employee who was an habitual smoker had not denied that he did smoke during or after the lunch period, but, in statements made shortly after the fire, had asserted that, while he was aware of the hazards of smoking in the woods and took precautions against fire whenever he did so, he could not remember whether he had smoked on this occasion, is sufficient to establish that the fire was caused by carelessness on the part of one of the contractor's employees.

Appeal of Paul C. Helmick Company, IBCA-39 (Supp.) (Aug. 21, 1958) 65 I. D. 355

RULES OF PRACTICE--Continued

EVIDENCE--Continued

Where in an appeal to the Secretary from a decision of the Director, Bureau of Land Management, holding certain mining claims null and void and rejecting application for patent of other claims, the appellants present assay reports and other information gathered after the Director's decision and not a part of the evidence adduced at a hearing, the evidence will be examined only to determine if it forms a sufficient basis for ordering a new hearing; it cannot become a basis for reversing the adverse decision as to the validity of the claims.

United States v. Albert Basil Capt et ux., A-27749 (Dec. 17, 1958)

Where in an appeal to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, holding mining claims null and void and rejecting patent application for the claims, the appellant presents assay reports not a part of the evidence adduced at a hearing, the evidence will be examined only to determine if it forms a sufficient basis for ordering a new hearing; it cannot become a basis for reversing the adverse decision as to the validity of the claims.

United States v. Maurice Constant, A-27779, (Dec. 30, 1958)

A railroad construction contractor who in connection with the rehabilitation of The Alaska Railroad was required to load, haul, and place ballast is entitled to additional payment therefor when it was misled by the specifications into believing that each carload of ballast would contain 42 cubic yards of ballast but the preponderance of the evidence shows that each car actually contained 48 cubic yards of ballast, notwithstanding that the foreman in charge of the contractor's ballast trains had certified in the course of the loading that each car contained 42 cubic yards of ballast, and the contractor's chief officer had not immediately challenged the erroneous certifications, since he did not learn the truth until after the loading of the ballast had been proceeding for a considerable time, and it was necessary to verify the capacity of the cars by checking with their manufacturer.

Appeal of William A. Smith Contracting Company, Inc., IBCA-83 (Jun. 16, 1959) 66 I. D. 233

Evidence available at the time of a hearing will not be considered as newly discovered evidence.

Estate of Lean Woman (Sankey), Arapaho Allottee No. 1487, IA-886 (Jun. 24, 1959)

RULES OF PRACTICE--Continued

EVIDENCE--Continued

A report of a Government inspector is admissible as evidence in a contract appeal proceeding notwithstanding that it was not prepared until the end of the day during which the events reported transpired, and that it was written up with the aid of notes made by the inspector during the course of the day which were destroyed after completion of the report.

Appeal of Flora Construction Company, IBCA-101 (Sept. 4, 1959) 66 I. D. 315

Where the Director of the Bureau of Land Management reverses the decision of a hearing examiner on the ground that material evidence was erroneously excluded from the hearing and that other evidence was improperly considered, and it appears that the former was not in fact excluded and that the latter was not considered, the case will be remanded to the Bureau for further consideration.

United States v. Charles R. Cartmel, A-28095 (Nov. 16, 1959)

GOVERNMENT CONTESTS

An appeal to the Director of the Bureau of Land Management from a decision of the manager of a land office which is filed with the Director after the 30-day period allowed by the rules of practice applicable to Government contests against mining claims is not timely filed and the Director's action in dismissing such an appeal is proper.

United States v. Harry A. Schultz and Susann Schultz, A-27296 (June 27, 1956)

Where the rules of practice of the Department provide that a hearing in a Government contest may be waived if all parties consent, and it appears in a contest brought against a mining claim that the disputed questions of fact can be satisfactorily resolved only by holding a hearing, the Department will not accede to a waiver of a hearing and a hearing will be ordered.

United States v. Elbert M. Barron, A-27450 (Sept. 18, 1957) 64 I. D. 360

RULES OF PRACTICE--Continued

GOVERNMENT CONTESTS--Continued

In order to prove service of a complaint upon an individual mining claimant by post-office return receipt, the return receipt should, with certain exceptions, contain the signature of the very person to be served, and in the usual case the return-receipt which accompanies the complaint should be checked in the item marked "Deliver only to addressee."

Proof of Service of Complaint Upon Individual Mining Claimant by Post-Office Return Receipt, M-36514 (Aug. 21, 1958)

HEARINGS

An applicant for a desert land entry is not entitled as a matter of right to a hearing to determine the proper classification of the land applied for.

Leonard E. Noren, Harry C. Perry, A-27147 (Aug. 1, 1955)

In a hearing on the propriety of a range manager's notice canceling an outstanding 10-year grazing permit, the Government has the burden of proof.

Frank Halls, A. J. Redd, A-27133 (Sept. 8, 1955) 62 I. D. 344

Where the time stamp on an application shows that it was prematurely filed and the applicant contends that the stamp is erroneous and that the application was timely filed, a hearing will not be held on the issue where there is no reasonable likelihood that a hearing would develop facts decisive of the issue and no showing is made by the applicant that he will be able to present evidence controverting the facts of record.

Margaret A. Andrews, Charles B. Gonsales, A-27328 (Feb. 4, 1957) 64 I. D. 9

RULES OF PRACTICE--Continued

HEARINGS--Continued

Where a timely objection was not raised by a contestee at a hearing that the hearing officer was not appointed in accordance with the provisions of the Administrative Procedure Act and there is no showing of actual prejudice to the contestee, there is no warrant for the Secretary to exercise his discretionary power to set aside the prior proceedings and to order a new hearing.

Where a contestee does not object to the fact that the hearing officer was not appointed in accordance with the provisions of the Administrative Procedure Act until the case is on appeal to the Secretary, the objection is not timely and does not require that the proceedings be set aside.

United States v. Alonzo A. Adams et al., A-27364 (June 3, 1957) 64 I. D. 221

Where the rules of practice of the Department provide that a hearing in a Government contest may be waived if all parties consent, and it appears in a contest brought against a mining claim that the disputed questions of fact can be satisfactorily resolved only by holding a hearing, the Department will not accede to a waiver of a hearing and a hearing will be ordered.

United States v. Elbert M. Barron, A-27450 (Sept. 18, 1957) 64 I. D. 360

In proceedings under Private Law 654 (84th Cong., 2d sess.), purchasers of land under the Alaska Public Sale Act who have paid the full purchase price for the land and who assert that they have performed the requirements for receiving patents on the land will be granted a hearing on the question whether they have complied with those requirements.

Matanuska Valley Lines, Inc., et al., A-27545 (May 12, 1958) 65 I. D. 214

An order of a hearing examiner denying a motion to postpone a hearing is not an appealable order and the movant has no right to appeal from the denial of his motion.

United States v. Reed H. Parkinson, A-27714 (June 23, 1958) 65 I. D. 282

RULES OF PRACTICE--Continued

HEARINGS--Continued

Claims of a contractor engaged in the construction of two substations for the Bonneville Power Administration based on charges of misconduct of the inspectors in supervising the work must be rejected when (1) the evidence in support of the claims is extremely stale; (2) the contractor in appealing has not requested a hearing at which the witnesses with knowledge of the events could be heard and subjected to cross-examination; (3) the top officials of Bonneville who were aware of the contractor's charges visited the site of the work for the purpose of investigating the charges, and after investigation found them to be groundless; (4) there is independent evidence of the good character and competence of the inspectors; (5) there were numerous shortcomings in the performance of the contractor's work that might have motivated his countercharges; (6) the charges are based on misunderstandings of the situations from which they arose; and, finally, (7) the charges run counter to inherent probabilities and are otherwise not credible.

Appeal of W & W Company, IBCA-54 (Aug. 4, 1958)

A public sale applicant is not entitled as a matter of right to a hearing for determining the proper classification of the land for which he applied.

Paul B. and Ruth M. Butler, A-27634 (Aug. 26, 1958)

The proponent of an Osage Indian will is not required to offer further evidence after having presented prima facie proof.

Estate of Mae F. Lassley, Osage Allottee No. 634, IA-882 (Sept. 29, 1958) 65 I. D. 421

The Director of the Bureau of Land Management has authority to remand a mining contest before him on appeal for the taking of additional evidence if he feels that the record is incomplete or that new developments may better reflect the facts upon which legal rights in question are predicated.

United States v. Vincent Creek Gold and Copper Company, A-27703 (Nov. 5, 1958)

RULES OF PRACTICE--Continued

HEARINGS--Continued

A protestant against an application for a survey of islands erroneously omitted from the public land survey can submit whatever evidence he deems pertinent in support of his protest, but there is no requirement that a formal hearing be held.

Willis W. Ritter et al., A-27755 (Dec. 22, 1958)

A petition for rehearing filed with an Examiner of Inheritance may properly be denied where the petition was not filed within the period prescribed by the applicable regulations.

Estate of Henry Amauty, IA-879 (Jul. 17, 1959)

It is not an abuse of discretion for the Director of the Bureau of Land Management to deny a hearing where the sole issue is the question of the proper classification of lands selected under the soldiers' additional homestead law.

Ferris F. Boothe, A-28058 (Nov. 23, 1959) 66 I. D. 395

Small-tract applicants for lands covered by a prior mining claim may be allowed to intervene in a contest brought by the United States against the validity of the mining claim.

In the absence of an extreme emergency, a motion for continuance first made at a hearing is properly denied since the Department's rules of practice require that it be made at least 10 days before the date of the hearing.

United States v. The Dredge Corporation, A-28022 (Dec. 18, 1959)

PRIVATE CONTESTS

It is proper to reject an application for a contest where all the factors upon which the claim to a contest is based are shown by the records of the Bureau of Land Management.

Northern Pacific Railway Company, Ralph L. Bassett, A-27114 (Oct. 20, 1955) 62 I. D. 401

RULES OF PRACTICE--Continued

PRIVATE CONTESTS--Continued

A contest against a homestead entry will be dismissed where the application to contest is not corroborated by the affidavit of a witness stating that he has personal knowledge of facts set forth in his affidavit which, if established, would render the entry subject to cancellation.

William Dittman, Henry N. Kvalvik, A-27312 (June 25, 1956)

One who merely hopes to lease land is not qualified as a contestant under that provision of the rules of practice which permits those "seeking to acquire title to or claiming an interest in the land involved" to apply to contest the claims of others in the public lands.

An application to contest outstanding coal prospecting permits will not be allowed where the allegations of the applicant, even if proved, would not affect the validity or legality of the permits.

United States Steel Corporation, A-27271 (Sept. 10, 1956) 63 I. D. 318

A person whose only relationship to a tract of public land is that he may be a prospective lessee has no right to bring a contest proceeding to dispute the determination made by the Secretary (or his delegate) to lease the land at auction and his objections to the auction are properly treated as a protest.

Lucille Mines, Inc., A-27558 (June 6, 1958)

PROTESTS

A protestant is not entitled as a matter of right to a hearing on his protest.

Heirs of Albert Peter Mracek, Alford Roos, A-27051 (April 13, 1955)

It is proper to treat as a protest rather than as an application to contest allegations which are uncorroborated as required by the Department's rules of practice.

Charles Schoenburg, Wilma I. Claverie, A-27434 (June 3, 1957)

RULES OF PRACTICE--Continued

PROTESTS--Continued

An oil and gas lease offeror may file a protest against the issuance or existence of a permit which authorizes another to drill slant wells from or through the land he desires to lease.

Floyd A. Wallis, The California Company, A-27547 (Sept. 19, 1958) 65 I. D. 417

A protest to the Secretary of the Interior will be dismissed where the issues involved are moot.

Maidee B. Frank et al., A-27594 (Nov. 17, 1958)

SUPERVISORY AUTHORITY OF SECRETARY

A request for reconsideration of action dismissing an appeal and approving the lost will of a deceased Indian will be denied where the petition fails to show persuasively that the decision reached an improper or unjust result.

Estate of Ute, Arapaho Allottee No. 1070, IA-143 (Aug. 25, 1955)

The Secretary of the Interior may, on his own motion, assume jurisdiction of appeals to the Director of the Bureau of Land Management.

Richard Leslie McLeod et al., A-27112, A-27151 (Sept. 12, 1955)

The Secretary of the Interior may assume jurisdiction of any matter before the Department at any time and act directly upon it himself without waiting for the matter to be presented on appeal.

Grayce R. Hiler, A-27370 (Dec. 19, 1956)

The Secretary of the Interior is not obliged to exercise his responsibility for the administration of the public land laws only by way of appeal. He may assume jurisdiction of any case

RULES OF PRACTICE--Continued

SUPERVISORY AUTHORITY OF SECRETARY --Continued

at any stage of the proceedings in the exercise of his supervisory authority over the public lands.

State of Louisiana, Department of the Army and Shell Oil Company, Protestants, A-27345 (Mar. 4, 1957)

Where a timely objection was not raised by a contestee at a hearing that the hearing officer was not appointed in accordance with the provisions of the Administrative Procedure Act and there is no showing of actual prejudice to the contestee, there is no warrant for the Secretary to exercise his discretionary power to set aside the prior proceedings and to order a new hearing.

United States v. Alonzo A. Adams et al., A-27364 (June 3, 1957) 64 I. D. 221

Where a swampland selection by the State of Louisiana has been denied by departmental decision, after previous departmental decisions indicated that the land was swamp in character in 1850, and where the heirs of the patentee of the State indicate that they have evidence that the land was, in fact, swamp in character in 1850, the departmental decision denying the selection will be suspended to afford the State and the heirs of the patentee an opportunity to present such evidence.

State of Louisiana, Department of the Army and Shell Oil Company, Protestants, Heirs of Charles F. Lefeaux, Interveners, A-27345 (Aug. 28, 1957)

Where a decision of the Department denying a swamp land selection by the State of Louisiana has been suspended to afford the State and interveners, who claim under a patent from the State, a further opportunity to present evidence as to the character of the selected lands and where the evidence presented does not establish the fact that the lands selected by the State were swamp lands in 1850, the suspended decision will be reinstated as the final determination of the Department that the State is not entitled to receive a patent for the selected lands.

State of Louisiana, Department of the Army and Shell Oil Company, Protestants, Heirs of Charles F. Lefeaux, Interveners, A-27345 (Supp.) (May 14, 1958)

RULES OF PRACTICE--Continued

SUPERVISORY AUTHORITY OF SECRETARY --Continued

Where the Bureau of Land Management rejected offers for oil and gas leases in Alaska on the ground that the lands applied for are not subject to leasing under the terms of the Mineral Leasing Act and where the offerors perfected their appeals to the Secretary of the Interior and requested that action on their appeals be deferred until the enactment of pending legislation which might confer preference rights on the offers and where legislation is subsequently enacted which does confer preference rights on those who meet the conditions of the new act, the offers will be remanded to the Bureau of Land Management for adjudication under the new legislation.

Eleanor C. Beritzhoff et al., A-27612, A-27622, A-27636, A-27715 (Aug. 6, 1958)

A petition for exercise of supervisory authority to reinstate an appeal will be denied when the petition merely requests such action because of an admitted failure to comply with the rules of practice in perfecting the appeal and renews arguments previously urged as grounds for reversal of the decision appealed from.

Joe Lyon, Jr., A-27824 (Jan. 14, 1959)

WITNESSES

In a proceeding under the "disputes" clause of a contract where the controversy arises out of a claim by the Government for suppression costs and damages incurred as a result of a fire alleged to have been caused by the contractor's operations, testimony by fire experts, even though they may be personnel of the agency that incurred such costs and damages, with respect to the probable cause of the fire is admissible.

Appeal of Paul C. Helmick Company, IBCA-39 (Supp.) (Aug. 21, 1958) 65 I. D. 355

SCHOOL AID

Public Law 60 of the Fourth Guam Legislature providing for the furnishing of textbooks adopted for use in the public elementary and secondary schools of Guam free to all students in both public and private elementary and secondary schools is a measure designed to aid the children of Guam rather than the schools they attend or the organizations sponsoring the schools.

Validity of Act of the Legislature of Guam Furnishing Textbooks Free of Charge to Students in Public and Private Elementary and Secondary Schools in Guam, M-36533 (Oct. 3, 1958)

SCHOOL LANDS

GENERALLY

Unsurveyed school sections found upon survey to be swamp in character pass to the State of Wisconsin, in accordance with the general rule, if at all, under the school grant and not the later swampland grant.

State of Wisconsin, A-27844 (Apr. 1, 1959) 66 I. D. 136

GRANTS OF LAND

Where land embraced in State selection has been included in small tract applications filed prior to the filing of the State's selection, and the land has also been classified as suitable for small tract development prior to the filing of the State selection, it is proper to reject the State selection application and to dispose of the land under the Small Tract Act.

State of Nevada, A-27369 (Nov. 7, 1956)

The grant of school sections made by the act of April 22, 1954 (68 Stat. 57), attaches only to a school section known on the date that the grant otherwise would become effective, to be of mineral character and then only if a mineral lease solely prevents the grant made by the act of January 25, 1927 (43 U.S.C. sec. 870), from attaching to the section. The act of April 22, 1954, supra, is not applicable to a school section the plat of survey of which was accepted on or after July 11, 1956.

SCHOOL LANDS--Continued

GRANTS OF LAND--Continued

The grant made by the act of July 11, 1956 (70 Stat. 529), attaches to a school section known on the date of acceptance of the plat of survey thereof to be of mineral character if that date was either July 11, 1956, or subsequent thereto, and then only if a mineral lease or permit solely prevents the grant made by the act of January 25, 1927 (43 U.S.C. sec. 870), from attaching to the section.

The grant made by the act of July 11, 1956 (70 Stat. 529), attaches to a school section not known on the date of the acceptance of the plat of survey or on July 11, 1956, whichever is the later date, to be of mineral character, and then only if a mineral lease or permit, solely prevents from attaching to the section, the grant made to the State by its enabling act.

Acts of April 22, 1954 (68 Stat. 57), and July 11, 1956 (70 Stat. 529), Amending the Act of January 25, 1927 (43 U.S.C. sec. 870), M-36408 (Feb. 7, 1957)

Subsection (d)(5) of section 1 of the act of April 22, 1954 (68 Stat. 57), as amended by the act of July 11, 1956 (70 Stat. 529; 43 U.S.C., 1952 ed., Supp. IV, sec. 870), which requires that when at the time rents, royalties, and bonuses accrue, the lands or deposits covered by a single lease are owned in part by the State and in part by the United States, they shall be allocated between them in proportion to the acreage in the lease owned by each, applies only during such period as the single lease is an outstanding, valid lease embracing both State and Federal lands or deposits. When the lease terminates in any manner in its entirety, or terminates or is assigned as to all of the State land, or as to all of the Federal land, subsection (d)(5) ceases to be operative with respect to the land in the lease.

Construction of Subsection (d)(5), Act of April 22, 1954 (68 Stat. 57), as Amended July 11, 1956 (70 Stat. 529; 43 U.S.C., 1952 ed., Supp. IV, Sec. 870), M-36460 (July 30, 1957)

A grant to a State for school purposes attaches to no specific sections until the lands are surveyed, and prior to survey the United States may make other disposition of such sections which have been reserved for school use.

Leasing of Property Along the Intracoastal Canal in T. 15 S., Rs. 1 and 2 E., La. Mer., Louisiana, M-36462 (Aug. 14, 1957) 64 I. D. 327

SCHOOL LANDS--Continued

GRANTS OF LAND--Continued

Numbered school sections which are included in mineral leases and applications are excepted from the provisions of subsection (c) of section 1 of the act of January 25, 1927, as amended, which prevent the attachment of the grant to States of numbered mineral school sections if, among other circumstances, the land is included in a valid application, claim, or right initiated or held under Federal laws until such application or right is relinquished or canceled.

Oil and gas lease applications pending when the plats of survey of school sections are accepted do not prevent attachment of the grant to the State of such school sections under the act of January 25, 1927, as amended by the acts of April 22, 1954, and July 11, 1956, even though the applications are filed 3 days before the acceptance of the plats of survey.

Mrs. Virginia E. Lewis, Max B. Lewis, A-27902 (May 8, 1959) 66 I. D. 204

INDEMNITY SELECTIONS

Where lands applied for in a State school indemnity selection have been classified as suitable for State selection, but the selection is properly rejected as to a portion of the lands, a decision erroneously rejecting the selection in its entirety will be reversed.

State of California, A-27276 (Mar. 12, 1956)

The application may not be rejected on the sole ground that the base lands, which had vested in the State prior to the inclusion of the land within the exterior boundaries of a reservation, are less valuable than the selected land.

Where lands applied for in a State school indemnity selection are classified as improper for such selection, the application is subject to rejection.

School Indemnity Selections Under the Act of February 28, 1891, M-36351 (June 19, 1956)

Where the United States has certified to a State, which follows the common law, as school indemnity selections, lots abutting on a meandered nonnavigable lake, the title to the bed of the lake passes to the State.

Grayce R. Hiler, A-27370 (Dec. 19, 1956)

SCHOOL LANDS--Continued

INDEMNITY SELECTIONS--Continued

The act of February 28, 1891 (26 Stat. 796; 43 U.S.C. secs. 851, 852), is not applicable to Alaska.

The lieu selection provision of the act of March 4, 1915 (38 Stat. 1214), does not authorize the selection of land known to be of mineral character. A reservation of a school section by the act of March 4, 1915, supra, bars mining locations on the section so long as the reservation is in effect. Such a reservation, short of an act of Congress, can be extinguished only by an approved selection in lieu of the land reserved.

School Sections Reserved for the Territory of Alaska by the act of March 4, 1915 (38 Stat. 1214), as Amended (48 U.S.C. sec. 353), and Lieu Selections Made Under that act, M-36229 (Feb. 4, 1957) 64 I. D. 27

Selected lands which contain valuable timber and are included in a management unit for sustained yield production are properly classified as not proper for acquisition as school indemnity lands.

State of California, A-27752 (Jan. 7, 1959)

A State indemnity selection is properly rejected where the lands are reportedly valuable for sodium, potash, and other minerals and are included in a potash lease, and where the disposal of the surface rights would interfere unreasonably with operations under the mineral leasing laws.

State of California, A-27805 (Feb. 19, 1959)

Section 2(c) of P.L. 85-771 (43 U.S.C. 852(c)), granting to States, upon the revocation of any order of withdrawal, a preference right for a period of not less than 6 months, to select such restored lands as indemnity for deficiencies in granted school lands, is construed to apply only to orders or notices of revocation and restoration of withdrawn lands to entry. Neither the act nor its legislative history requires that the States' preference right shall be extended to include orders or notices opening to entry under the public land laws lands acquired by the United States by exchange under the Taylor Grazing Act.

Applicability of the Act of August 27, 1958 (P.L. 85-771; 72 Stat. 928) upon Restoration to Entry of Lands Acquired by the United States by Exchange under Section 8 of the Taylor Grazing Act, M-36558 (Apr. 9, 1959)

SCHOOL LANDS--Continued

INDEMNITY SELECTIONS--Continued

If the evidence fails to establish either the mineral nature of or the discovery of valuable mineral deposits in land classified as suitable for disposal to a State as school indemnity selection there is no basis for denying the State's right to acquire the land as an indemnity selection.

A protest against a school indemnity selection can be raised for the first time on an appeal to the Secretary prior to final approval and certification of the selection.

Augusta G. Stanley v. State of California, A-27928 (Jun. 15, 1959)

Public land isolated by topography from other public lands in the vicinity and containing no resources required for public purposes is properly classified for State indemnity selections and protests against such selections by grazing users of the land are properly denied where the protestants do not show that cancellation of their grazing use would seriously interfere with their grazing operations.

Bess M. Fulstone et al., A-27987 (Aug. 6, 1959)

MINERAL LANDS

The Secretary of the Interior may withdraw after January 25, 1927, a mineral school section unsurveyed at the time of the enactment of the act of January 25, 1927, and title to the section will not pass to the State upon the acceptance of the plat of survey thereafter so long as the withdrawal is unrevoked.

State of Utah, Kearns Corporation, A-27091 (April 13, 1955) 62 I. D. 141

A State indemnity selection is properly rejected where the lands are reportedly valuable for sodium, potash, and other minerals and are included in a potash lease, and where the disposal of the surface rights would interfere unreasonably with operations under the mineral leasing laws.

State of California, A-27805 (Feb. 19, 1959)

SCHOOL LANDS--Continued

MINERAL LANDS--Continued

Numbered school sections which are included in mineral leases and applications are excepted from the provisions of subsection (c) of section 1 of the act of January 25, 1927, as amended, which prevent the attachment of the grant to States of numbered mineral school sections if, among other circumstances, the land is included in a valid application, claim, or right initiated or held under Federal laws until such application or right is relinquished or canceled.

Mrs. Virginia E. Lewis, Max B. Lewis, A-27902 (May 8, 1959) 66 I. D. 204

PARTICULAR STATES

Determinations by the Federal Power Commission that the power values of certain school sections will not be injured or destroyed by "location, entry, or selection" under the public land laws, subject to the provisions of section 24 of the Federal Power Act, followed by a public land order modifying the powersite reservations, withdrawals or classifications for the purpose of allowing the grants made to the State of Utah by either the act of July 16, 1894 (28 Stat. 107), or the act of January 25, 1927 (44 Stat. 1026; 43 U. S. C. sec. 870), to attach, would be ineffective to accomplish that purpose. There is no authority of law for burdening such grants with the conditions and limitations of section 24 of the Federal Power Act.

Proposed Modifications of Powersite Reservations, Withdrawals and Classifications so as to Permit the Grants of School Sections Made to the State of Utah by Either the Act of July 16, 1894 (28 Stat. 107), or the Act of January 25, 1927 (44 Stat. 1026; 43 U. S. C. sec. 870), to Attach, Subject to the Provisions of Section 24 of the Federal Power Act, M-36484 (Dec. 26, 1957)

SCRIP

(See also Soldiers' Additional Homesteads)

GENERALLY

Land determined by the Department to be patented land and not public land of the United States is not subject to selection by McKee scrip and an application to select such land will be rejected.

Coast Line Lands Company, A-27360 (Aug. 20, 1956)

RECORDATION

The Department is required to refuse to record scrip offered for recording more than two weeks after the end of the period specified by the statute which requires recording; erroneous information as to the termination of the statutory period for recording will not permit the Department to ignore the plain provision of the statute.

Warren A. Taylor, A-27702 (Nov. 5, 1958)

SPECIAL TYPES OF SCRIP

Land determined by the Department not to be public land of the United States is not subject to selection under the forest lieu selection acts.

Hannah P. Noonan-Gordon, A-27501 (Nov. 14, 1957)

SECRETARY OF THE INTERIOR

There is authority in the Secretary, under Reorganization Plan No. 3 of 1950 and his general authority to establish an organization to perform functions vested in him, to establish the position of "Associate" or "Deputy" Director of the Fish and Wildlife Service and to provide that this officer perform such functions relating to fish or wildlife as may be deemed desirable.

Assistant Directors, Fish and Wildlife Service, M-36258 (Jan. 20, 1955) 62 I. D. 65

SECRETARY OF THE INTERIOR--Continued

Accrued rental under a grazing lease becomes a debt due to the United States which the Secretary of the Interior has no authority to waive or compromise.

E. R. Wheeler, A-27069 (April 1, 1955)

The Secretary of the Interior has authority under the provisions of the act of June 6, 1924 (43 Stat. 464; 48 U.S.C. 221 et seq.), to prescribe the maximum number or type of boats or fishing gear that may fish within a designated fishing area in the waters of Alaska. He also may stipulate the area or areas within which a particular boat or gear will be permitted to fish. He also may require that each boat or type of gear be licensed and may fix a reasonable fee to be paid for any required license.

Act of June 6, 1924 (43 Stat. 464), M-36276 (April 22, 1955)

The act of August 12, 1954 (68 Stat. 698; 16 U.S.C. 1021 et seq.), authorizes the Secretary of the Interior to regulate the taking of salmon and herring on the high seas in areas contiguous to the territorial waters of Alaska.

Act of August 12, 1954 (68 Stat. 698), M-36273 (April 22, 1955)

The reorganization of legal activities of the Department represents an exercise by the Secretary of continuing authority under Reorganization Plan No. 3 of 1950 to transfer and reassign functions.

Transfer of Funds to Office of Solicitor, M-36233 (May 19, 1955) 62 I. D. 181

The Secretary of the Interior has no authority to reform a unit agreement, approved by him pursuant to the provisions of the Mineral Leasing Act, to include land which, through error, was not committed to the unit agreement.

Shannon Oil Company, A-27119 (June 27, 1955) 62 I. D. 252

The obligation or expenditure by the Government of the Virgin Islands of matching funds in an amount exceeding that approved by the Secretary of the Interior contravenes a statutory restriction and the irregularity cannot be cured by retrospective approval.

SECRETARY OF THE INTERIOR--Continued

Although the aggregate obligations of matching funds have exceeded the limit set by the Secretary, he may approve the expenditure from a budgetary reserve of such funds for a purpose for which any given obligation was made where the over-obligation is not attributable to a specific obligation or several specific obligations.

Obligation and Expenditures of Matching Funds--Virgin Islands, M-36293 (July 13, 1955)

An operating agreement between the Secretary of the Interior and private utilities defining the areas to be served by each may properly be entered into where the relevant statutes contain no prohibition against such an agreement.

Officers and employees of the United States are without authority to sell or lease property belonging to the United States unless specifically authorized by the Congress to do so.

Where the Congress has clothed the Secretary of the Interior with authority to manage and operate an electric power system, that authority may not be transferred to a private utility or independent board without a clear indication on the part of Congress that such action may be taken.

Authority to Manage and Dispose of the San Carlos Power System, M-36296 (July 25, 1955) 62 I. D. 285

The President's authority under the Defense Production Act with respect to priorities and allocations has, with respect to helium, been delegated to the Secretary of the Interior, subject to certain limitations, and can be redelegated by the Secretary of the Interior to any official or agency of the Federal Government, including the Bureau of Mines.

Whether Authority Exists for Operating a Priorities and Allocation System for Helium Among Federal Agencies and Private Users, and What Delegations Would be Required to Enable the Bureau of Mines to Exercise Such Authority, M-36299 (Aug. 22, 1955) 62 I. D. 323

Although the approval of the Management Specialists retained under the Klamath Termination Act of such a lease [see title] is not essential to its validity, the manifold duties imposed upon them by the act require that they be consulted, and that their advice be obtained before any such lease is executed or approved.

SECRETARY OF THE INTERIOR--Continued

A lease for the mining of diatomaceous earth on tribal lands of the Klamath Reservation in Oregon may be made for a period extending beyond the date fixed by Congress for the termination of Federal supervision and control only where it is clear that such a lease will not prevent or delay the termination of Federal trustee responsibilities.

Lease of Klamath Tribal Land Which Extends Beyond the Date Fixed by Congress for the Termination of Federal Supervision and Control, M-36307 (Nov. 17, 1955)

The Secretary of the Interior must cancel leases or permits issued without authority of law.

Seminole Rock and Sand Company, A-27282 (Feb. 24, 1956)

When the Secretary of the Interior in the process of determining who shall inherit a restricted Indian estate makes findings regarding the marital status of the deceased Indian and of any person claiming as her surviving spouse, the Secretary is not bound by State law or State orders or decrees on the subject.

Estate of Jeanette Scott Edland, Unallotted Nez Perce Indian, IA-107 (May 17, 1956) 63 I. D. 141

The Secretary of the Interior is not authorized by Federal reclamation law to agree to provisions in the proposed contract with the Kings River Conservation District whereby individual holders of excess lands will be permitted to pay the reimbursable costs allocable to their excess holdings and thereby be relieved from the limitations on supplying water to excess lands and the consequences of the anti-speculation features of the recordable contracts required by law.

Proposed Contract Between the United States and the Kings River Conservation District, M-36457 (July 10, 1957) 64 I. D. 273

The fact that an heir who was enrolled with the Creek Tribe of the Five Civilized Tribes had received an allotment of land with another tribe of Indians justified action by the Commission to the Five Civilized Tribes and the Secretary of the Interior striking the heir's name from the Creek roll, which action was final after the passage of the act of April 26, 1906 (34 Stat. 137).

SECRETARY OF THE INTERIOR--Continued

The authority of the Commission to the Five Civilized Tribes and of the Secretary of the Interior to strike names from the rolls of the Five Civilized Tribes, after notice and an opportunity to be heard, continued to March 4, 1907, when the rolls were closed.

Jurisdiction Over Property Belonging to a Five Tribes Indian's Estate, M-36455 (July 12, 1957) 64 I. D. 280

Where a contract for the sale of Indian timber authorizes the Secretary to redetermine stumpage prices upon a finding of changed conditions, the Secretary has broad discretion to consider those factors and use those tests and methods of valuation which a capable and prudent businessman would use.

Construction of a Contract for the Sale of Indian Timber, M-36461 (July 22, 1957) 64 I. D. 305

Where an act clearly authorizes the Secretary of the Interior to take action when he determines that such action would be in the public interest and the only qualification on that authority is that he is directed to issue regulations governing such action resort to the legislative history or other extraneous aids to construction in an effort to so construe the law as to shear the Secretary of all discretion is not authorized.

Where an act vests the Secretary of the Interior with discretionary authority but directs him to issue regulations governing the exercise of his discretion, the authority of his delegate to act in any given time must be exercised conformable to the regulation then in force.

Leasing of Oil and Gas Deposits Under Rights-of-Way, M-36465 (Aug. 9, 1957)

Although no clear authority has been delegated to the Secretary of the Interior to dispose of timber upon allotted Indian land without the consent, express or implied, of all co-owners, he has authority, and also a responsibility to approve and facilitate the sale or other salvage of timber thereon without obtaining unanimous consent, in order to prevent loss from fire, decay, insect infestation or disease.

Consent of Indians for Sale of Allotted Timber, M-36477 (Mar. 5, 1958) 65 I. D. 101

SECRETARY OF THE INTERIOR--Continued

Under the permissive language in the Mineral Leasing Act, consent to lease may be granted subject to appropriate conditions prescribed by the Secretary.

Validity of Regulations Relating to Oil and Gas Leases on Wildlife Refuges, Game Range and Coordination Lands, M-36519 (July 15, 1958) 65 I. D. 305

The Deputy Solicitor has been delegated authority to decide land appeals taken to the Secretary of the Interior and his decisions on such appeals are, in effect, decisions of the Secretary.

The Dredge Corporation, A-27429 (Supp.) (Aug. 14, 1958) 65 I. D. 336

The Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 181 et seq.), as amended, prescribes in terms those to whom mineral leases may be issued and, therefore, excludes all others. It does not provide for the issuance of leases to tenancies as such.

May Oil and Gas Leases be Owned by Two or More Persons With Right of Survivorship? M-36434 (Sept. 12, 1958)

The Secretary of the Interior is charged with the responsibility, under section 8 of the Flood Control Act of 1944, for the repayment of allocations to irrigation functions of dam and reservoir projects operated under the direction of the Secretary of the Army.

The foregoing responsibility exists whether or not additional facilities are required for irrigation functions at such dam or reservoir projects.

The foregoing responsibility requires negotiation of appropriate repayment contracts with water users for repayment of appropriate allocations to irrigation functions.

Responsibility of the Secretary of the Interior Under the Flood Control Act of 1944 for Irrigation Functions at Dam and Reservoir Projects Operated Under the Direction of the Secretary of the Army, M-36475 (Nov. 1, 1957) 65 I. D. 525

/This opinion was not released until Dec. 15, 1958, the date of the Attorney General's opinion regarding it. See 65 I. D., p. 549. /

SECRETARY OF THE INTERIOR--Continued

The authority of the Secretary to cancel an oil and gas lease is independent of the right of the lessee to a refund and the Secretary need not determine prior to or simultaneously with cancellation whether the lessee is entitled to a refund of moneys paid to the United States in connection with the lease.

Max Barash, The Texas Company, A-27239 (Supp. II) (Mar. 18, 1959) 66 I. D. 114

SMALL TRACT ACT

GENERALLY

An application for a small tract lease which is filed after another lease application has been filed for the same land should not be rejected for that reason alone.

Minta Harper Dozier, A-27221 (Nov. 17, 1955)

A small tract application should not be rejected merely on the basis of the fact that another application for the same land has been filed, but action on the junior application should be suspended until the qualifications of the senior applicant to hold a lease have been determined and a lease issued to him.

A small tract application is properly rejected where the application is filed after another small tract application for the same land and a lease has been issued to the first applicant.

Roy H. Davis, A-27359 (Aug. 15, 1956)

A small tract lease which was erroneously allowed on oil shale lands withdrawn by Executive order of the President is null and void, and the lease must be canceled.

Bud E. Burnaugh, A-27356 (Sept. 4, 1956)

The act of March 31, 1950 (64 Stat. 39; 43 U.S.C., Supp., 375(b)-375(f)), is applicable to reclamation withdrawn lands without distinction as to the form of withdrawal.

Disposal of Land--Guernsey Reservoir, North Platte Project, M-36433 (Apr. 12, 1957)

SMALL TRACT ACT--Continued

GENERALLY--Continued

Land under lease or patent pursuant to the Small Tract Act is not open to location under the mining laws.

The Dredge Corporation, A-27429 (Sept. 23, 1957) 64 I. D. 368

The Soldiers' and Sailors' Civil Relief Act of October 17, 1940, cannot be construed to apply to persons who initiated or acquired any interest in the public domain while already a member of the military service, and a lessee under the Small Tract Act who was a member of the military service at the time his lease was issued cannot secure any relief from the requirements of his lease on the basis of that act.

Russell L. Coe, A-27527 (Jan. 24, 1958)

A protest against the issuance of a small tract lease is properly dismissed where the protestant never filed a proper application for the land involved, and the lease against which the protest is lodged was in all respects properly issued.

Where land is included in an outstanding small tract lease, there is no basis for giving part of the land to another applicant in the absence of grounds for canceling the lease.

Harold H. Beck, A-27725 (Nov. 12, 1958)

One who has used a small tract under apparent right and has spent a substantial amount of money in improving the tract, if unable to lease or purchase the tract, should be allowed a reasonable time to remove his improvements if they can be removed without substantial damage to the land or to the improvements, and any other person who may become entitled to use or acquire the tract should be required to reimburse the person placing improvements thereon for the reasonable value of the permanent improvements which are left on the land and are of value to the person acquiring the land.

Frank E. Hale, A-27741 (Dec. 18, 1958)

SMALL TRACT ACT--Continued

APPLICANTS

Where two or more qualified individuals, not otherwise a partnership or association, join in one application to acquire and develop a single small tract for any of the purposes authorized by the Small Tract Act of 1938 as amended (43 U.S.C. sec. 682a), they may be considered as "joint adventurers" with respect to that application and tract, and as such to constitute a "partnership" within the meaning of the act and the regulations thereunder (43 CFR 257.4(a)(2)). In the absence of other objection, a lease (including option to purchase clause when appropriate) may be issued in their names pursuant to such application.

A husband and wife team are not precluded, merely because of their marital relationship, from becoming "joint adventurers" in a single application for a small tract lease, and may likewise be considered a "partnership" within the meaning of the act and of the regulations.

Issuance of Small Tract Leases in the Names of Two or More Persons, M-36343 (Apr. 24, 1956)

One who has made improvements on public land under an assumption of right but who loses his right may, under certain circumstances, be allowed a reasonable time within which to remove any improvements from the premises that can be removed without substantial damage to the land, and a prospective small tract lessee of the land may be required, as a condition precedent to the issuing of the lease, to reimburse the former for the reasonable value of all the permanent improvements which are left on the land and which are of value to the lessee.

William D. Cunningham, Alice F. McGrath, A-27297 (May 28, 1956)

A husband and wife are not, by reason of their marital relationship alone, "one person" within the meaning of the limitation in section 1 of the Small Tract Act that no person shall be permitted to purchase or lease more than one small tract except upon a showing of good faith and reasons satisfactory to the Secretary; but each spouse must be regarded as an individual person under this limitation.

Each spouse of a married couple, if otherwise qualified, may be considered as an "individual" within the meaning of the 1954 amendment to section 1 of the Small Tract Act, and, in the absence of other objection, each may apply for a small tract or enter into an appropriate drawing for a small tract.

Preference Right of Veteran and Spouse; Small Tract Act (43 U.S.C. sec. 682a-e), as Amended, M-36427 (Feb. 19, 1957)

SMALL TRACT ACT--Continued

APPLICATIONS

An application for a lease under the Small Tract Act must be rejected where the land applied for is within a power site reserve.

Lee Kisner et al., A-27189 (Nov. 7, 1955)

A small tract application is properly rejected where an application for the land was filed prior to the time the rejected application was filed and a lease was issued to the prior applicant, the issue of priority of filing having been determined in accordance with administrative rules adopted by the land office to assure fairness in establishing the time of filing applications.

Everta P. Ericson, A-27264 (Mar. 12, 1956)

Where applicants to purchase land under a small tract lease deposited the application and purchase money in escrow with a bank and directed the bank to file the application within a certain time and the bank delayed the filing beyond the time specified, the applicants must suffer whatever consequences result from the action of their agent.

Albert H. Dobry, George H. Borovay, A-27387 (May 8, 1957) 64 I. D. 116

A small tract application is properly rejected where, at the time the application was filed, the land applied for was embraced in a prior lease and the lessee had applied to purchase the tract.

Clyde O. Tarrant, A-27480 (Oct. 3, 1957)

Where an offer to lease land under the Small Tract Act is rejected by the manager on the grounds that the land has been classified as suitable for disposition under the public sale laws, but the applicant is given the right to either appeal to the Director or show cause why his application should not be finally rejected, and the applicant fails to appeal or to make any showing, the applicant abandons any rights he may have acquired by his application, like a veterans' preference right, and may not at a later date reclaim his preference right when the land is reclassified as suitable for small tract disposition.

John R. Moran, Frankie Azalee Johnson, A-27463 (Oct. 21, 1957)

SMALL TRACT ACT--Continued

APPLICATIONS--Continued

A small tract application for land included in pending applications by the former lessee to purchase the land or to renew his lease should not be rejected, but suspended, until final action is taken on the pending prior applications.

Earl Edward Cherrier, A-27569 (Apr. 29, 1958)

An application for a small tract lease should be suspended where at the time the application is filed the prior lessee has been granted an extension of time within which to exercise an option to purchase.

John A. Hall, Jim Swenson, A-27555 (May 6, 1958)

A decision sent by registered letter by the land office to an applicant for a small tract, requiring him to fill out his application on new forms and remit within 30 days after receipt of the letter, constitutes notice to the applicant even though the letter was not received because the applicant had changed his address without notifying the land office so that rejection of the application is proper for want of response from the applicant.

John W. Southard, Clarence H. Pittman, A-27627 (Aug. 15, 1958)

The responsibility for filing a proper small tract application devolves on the applicant and he cannot be heard to complain if, at his request, he receives information from a land office employee which proves to be incorrect.

Harold H. Beck, A-27725 (Nov. 12, 1958)

A small tract application is properly rejected where the land applied for is embraced in a small tract lease issued pursuant to a prior offer for the same land.

Joe H. Recchia, A-27983 (Jul. 31, 1959)

The filing of a small tract application does not create in the applicant any right or interest in the land covered by the application which entitles him to a hearing before any action can be taken, such as patenting the land to another, which necessitates the rejection of the small tract application.

Miles W. Payne, A-28030 (Aug. 17, 1959)

SMALL TRACT ACT--Continued

APPLICATIONS--Continued

The filing of a small tract application does not create in the applicant any right or interest in the land covered by the application which imposes any bar to an adverse classification of the land.

Burton C. Corwin et al., A-28048 (Oct. 30, 1959)

CLASSIFICATION

Merely because land can be properly classified as suitable for small-tract application is not sufficient reason for refusing to classify that land as proper for State selection under a land grant.

Isabel Gunnerson et al., State of Nevada, A-26952 (Feb. 11, 1955)

Where an isolated area of public land comprising approximately 37 acres is suitable for disposition in its entirety as an isolated tract or possibly as several small tracts, it is in the public interest to dispose of it as an isolated tract where there is no assurance that the entire area could be disposed of at once as small tracts and where small tract disposition would require a further survey of the land.

James J. Kendrew, A-27145 (April 8, 1955)

An application under the Small Tract Act to enter lands embraced within a stock-driveway withdrawal is properly rejected where it is shown that the land is needed to furnish access to a watering place.

William C. Parson, A-27089 (April 12, 1955)

Applications for small tract leases are properly rejected where the land applied for is unsuitable for small tract development because it is low, marshy and swampy land which would require drainage and filling at a high cost in order to make it suitable for building sites or occupation, and the land is more suitable for disposition under the public sale laws.

Louis Bosse et al., A-27085 (April 15, 1955)

SMALL TRACT ACT--Continued

CLASSIFICATION--Continued

Where small tract applications have been filed some 3 years before a State indemnity selection is filed, and the land is classified as suitable for small tract purposes over 8 months before the State selection is filed, the small tract classification will not be changed upon a conjectural allegation that small tract development will lead to the creation of "eyesores."

State of California, A-27191 (Oct. 14, 1955)

Where consummation of a private exchange would result in the blocking up of the Government land in the area in a more uniform land pattern and the offered lands exceed the value of the selected lands, applications filed under the Small Tract Act for the selected lands may be properly rejected.

John R. Ross et al., A-27259 (Mar. 12, 1956)

Where small tract applications are rejected for the reason that the lands applied for are too mountainous and rocky for small tract purposes, and an examination of topographic maps and photographs discloses that the lands are located along the lower slopes of a mountainous area, but contain substantial areas of reasonably level land suitable for the construction of facilities usually associated with small tract occupancy, the decision rejecting the applications will be reversed.

Charles E. Wolle et al., A-27292 (May 28, 1956)

A small tract application will be rejected where the land applied for lies on a steep rocky slope and is inaccessible by road, and is more suitable for disposition by public sale.

Harry Carson et al., A-27289 (May 28, 1956)

Applications for small tract leases on lands embraced within a stock-driveway withdrawal are properly rejected where it appears allowance of the applications would have the effect of rendering the stock driveway useless or seriously impeding the use of the driveway.

Leslie Ardell Silliman, Lester Elden Clement et al., A-27255, A-27302 (May 31, 1956)

SMALL TRACT ACT--Continued

CLASSIFICATION--Continued

A small tract application for land which is unsuitable for small tract purposes because of its remote location, inaccessibility, and sand dunes is properly rejected.

Lambert A. Bartnick, A-27316 (June 7, 1956)

An application for a small tract lease is properly rejected where the land applied for is unsuitable for small tract development because it has no access to a beach, is inaccessible except over privately owned land, and is for the most part covered by portions of a lake and swamp and sand dunes up to 12 feet in height.

Eugene Robson, A-27334 (July 13, 1956)

An application for a small tract lease of public land is properly rejected where the land applied for lies within the flood channel of a creek subject to flash floods.

Mrs. Jessie M. Rowland, Sidney Thomas Morris, A-27354 (Aug. 13, 1956)

Land embraced in a small tract lease application which is within an area withdrawn by an Executive order of the President other than orders Nos. 6910 and 6964 cannot be classified for disposition under the Small Tract Act.

Bud E. Burnaugh, A-27356 (Sept. 4, 1956)

A small tract application is properly rejected where the land applied for is an island consisting of solid coral 1 to 2 feet above sea level, is almost swept bare of any soil by high seas, contains no culinary water, and is generally unsuitable for the location of a permanent type residence.

James L. Knight, A-27374 (Sept. 19, 1956)

Where land embraced in State selection has been included in small tract applications filed prior to the filing of the State's selection, and the land has also been classified as suitable for small tract development prior to the filing of the State selection, it is proper to reject the State selection application and to dispose of the land under the Small Tract Act.

State of Nevada, A-27369 (Nov. 7, 1956)

SMALL TRACT ACT--Continued

CLASSIFICATION--Continued

A small tract application is properly rejected where the land applied for is wet and swampy, submerged during high tide, and inaccessible except by boat.

James A. Canning, Richard C. Hill, Jr., A-27407 (Feb. 7, 1957)

A small tract application is properly rejected where the land applied for is covered with cobbles and boulders and the land is best suited for disposition by public sale.

Della Lee Halloran, A-27433 (Supp.) (May 31, 1957)

A small tract application is properly rejected where the land applied for is isolated, rough and mountainous and is more suitable for disposition by public sale.

Nelson W. Hope, A-27570 (Apr. 17, 1958)

Small tract applications are properly rejected where the land applied for is being managed under a cooperative agreement with a State under which the State has installed watering devices in furtherance of its game restoration program and where the land is now being used extensively by hunters and others for recreational purposes.

Leroy E. Cassou et al., A-27600 (Aug. 26, 1958)

Where land has been classified for disposition under the Small Tract Act and the record indicates that it is chiefly valuable therefor, a public sale application for the land is properly rejected.

Paul B. and Ruth M. Butler, A-27634 (Aug. 26, 1958)

A classification made in response to applications filed under the Small Tract Act which finds lands unsuitable for disposition as homesites because of isolation, insufficiency of water suitable for domestic uses and absence of necessary utilities and facilities for community life will not be disturbed in the absence of positive evidence that the classification is erroneous.

Lewis E. King et al., A-27772 (Nov. 21, 1958)

SMALL TRACT ACT--Continued

CLASSIFICATION--Continued

Applications under the Small Tract Act are properly rejected where the lands applied for are required for retention in Federal ownership for reclamation and public recreation purposes.

Mrs. Claudia H. Smith et al., Mrs. Jerry Funkhouser et al., A-27781, A-27790 (Dec. 12, 1958)

It is proper to reject offers to lease small tracts where the tracts are in an area subject to strong wind movements, severe sand storms, and periodic flooding, which conditions render the tracts unsuitable for disposition under the Small Tract Act.

Nick Furkona, Joseph F. Skiba, A-27787 (Dec. 15, 1958)

A small tract application for land which is topographically unsuited for small tract disposal is properly rejected.

Ruth Gary, A-27789 (Jan. 12, 1959)

Small tract applications for land which is topographically unsuitable for small tract development are properly rejected.

William L. Majors et al., A-27730 (Jan. 12, 1959)

An 80-acre tract of public land surrounded on three sides by privately owned land of a public sale applicant and inaccessible on the other because of altitude, which can be disposed of as one isolated tract or a number of small tracts, is properly classified as suitable for disposal at public auction in a single tract at the request of the owner of the surrounding land because of the lack of public access.

Albert F. Bolz, Lionel John Benner et al., A-27804 (Feb. 3, 1959)

Small tract applications for land which is rough and mountainous and desired for recreational use are properly rejected.

Lawrence E. Lowry et al., A-27835 (Mar. 2, 1959)

Small tract applications for public land are properly rejected where the tract of land involved is largely unsuitable for small tract development and the land is more suitable for disposition at public sale.

Alexander W. Whyte, Richard L. Allen, A-27866 (Mar. 31, 1959)

SMALL TRACT ACT--Continued

CLASSIFICATION--Continued

A half section of rough, mountainous, public land entirely surrounded by privately-owned land, which can be disposed of as one isolated tract and which contains only one 5-acre tract possibly suitable for disposal as a small tract, is properly classified as suitable for disposal in its entirety by public sale.

Regina G. Owen, A-27916 (May 19, 1959)

Marsh land adjacent to a lake on which it may be possible to construct a summer cabin and which was previously classified as more suitable for state exchange for addition to a state forest may properly be classified as suitable for disposal under the Small Tract Act when the state application has been withdrawn.

William Mills Otter, A-27859 (Jun. 18, 1959)

A small tract application for land which is topographically unsuited for small tract disposal is properly rejected.

Raymond B. Oliver, A-28016 (Aug. 17, 1959)

A small tract application for public land is properly rejected where the land is unsuitable for small tract development and where the land is a part of a larger area which is suitable for disposition at public sale.

Richard W. Greenman, A-28044 (Oct. 9, 1959)

A small tract application for land which is unsuited for small tract disposal because of topography, erodible soil, and lack of access roads and which is within one-half to a quarter mile of a reservoir where a need for public recreational areas is anticipated is properly rejected.

Burton C. Corwin et al., A-28048 (Oct. 30, 1959)

LANDS SUBJECT TO

Where a public land order revoking a prior withdrawal states that a part of the land restored shall not be subject to the initiation of any rights or any disposition under the public land laws until so provided by a classification order, and no such order has been issued, an application to enter the lands under the Small Tract Act is properly rejected.

John Francis Ruby, A-27301 (May 4, 1956)

SMALL TRACT ACT--Continued

LANDS SUBJECT TO--Continued

Land withdrawn from all forms of appropriation under the public land laws by a public land order is not subject to the operation of the Small Tract Act.

Arwin P. Curran, Sr., A-27474 (Aug. 20, 1957)

If the City of Henderson, Nevada, waives its rights under Public Law 522, 84th Congress, 2d session (70 Stat. 156), as to any land, the act ceases to be operative as to that land and the public land laws, including the Small Tract Act, becomes applicable to it.

Public Law 522, 84th Congress, 2d Session (70 Stat. 156), and Application of the Townsite Laws (43 U. S. C. secs. 711-728; 43 CFR 255. 9-255. 54), M-36486 (Oct. 30, 1957)

An application for a lease under the Small Tract Act must be rejected where the land applied for is within a power site reserve, and the application will not be held in a suspended status to await the possible lifting of the withdrawal.

John Rovetto, A-27521 (Dec. 9, 1957)

A small tract application is properly rejected where the land applied for is reserved as a part of the Wichita Mountain Wildlife Refuge.

Bert M. Alford, A-27617 (July 24, 1958)

Land within a powersite withdrawal is not subject to disposition under the Small Tract Act, and an application for a lease under that act must be rejected and will not be suspended to await possible lifting of the withdrawal and restoration of the land to entry.

Joel F. and Celia Mae Swank, A-27638 (Aug. 7, 1958)

Land included within a desert land entry is not subject to disposition under the Small Tract Act; an application for lease or purchase for such land under that act must be rejected.

Dale E. Sackett, A-27782 (Dec. 19, 1958)

SMALL TRACT ACT--Continued

LANDS SUBJECT TO--Continued

Land withdrawn from all forms of appropriation by executive order as part of the Sequoia National Forest is not subject to the operation of the Small Tract Act.

Harold Ripley, A-27955 (Jun. 15, 1959)

PREFERENCE RIGHTS

An application for a 5-acre tract filed under the Small Tract Act is properly rejected where all of the land applied for is embraced in prior applications which are entitled to a preference right to lease the land.

Warren E. Portenier, A-27212 (Nov. 14, 1955)

Where an offer to lease land under the Small Tract Act is rejected by the manager on the grounds that the land has been classified as suitable for disposition under the public sale laws, but the applicant is given the right to either appeal to the Director or show cause why his application should not be finally rejected, and the applicant fails to appeal or to make any showing, the applicant abandons any rights he may have acquired by his application, like a veterans' preference right, and may not at a later date reclaim his preference right when the land is reclassified as suitable for small tract disposition.

John R. Moran, Frankie Azalee Johnson, A-27463 (Oct. 21, 1957)

Where the land applied for by a small tract applicant who has gained a priority under the pertinent regulation as the first applicant is offered for sale in several tracts smaller than the land for which he applied and including other lands, the applicant is entitled to that tract which conforms most closely to his application and proposed use, even though that tract has been allocated to another applicant who filed later than he did, but still in time to earn a priority.

Charles A. Taylor et al., Russell S. Lee, A-27733 (Dec. 15, 1958)

An application for acquisition of land under the Small Tract Act filed before receipt by the land office of notice of consideration of the

SMALL TRACT ACT--Continued

PREFERENCE RIGHTS--Continued

land for small tract classification will be given priority upon the applicant's compliance with the conditions specified by 43 CFR, 1958 Supp., 257.5(a).

William Mills Otter, A-27859 (Jun. 18, 1959)

RENEWAL OF LEASE

A small tract lease for land which is classified for lease and sale will not be renewed where improvements have not been constructed thereon during the term of the original lease.

Ernest J. Van Loon, A-27087 (April 12, 1955)

Where the terms of the lease and applicable departmental regulation require a small tract lessee who wishes to renew his lease to file an application therefor before the expiration of the lease, and an application to renew a small tract lease is not filed until after the lease had expired and after the tract was leased to another person, the application to renew must be rejected where there is no ground for canceling the existing lease.

Angelo Dalporto, A-27110 (April 20, 1955)

Where an application for renewal of a small tract lease is not filed within the time limits imposed by the terms of the lease and the regulations of the Department and the lease terms requiring the construction of improvements have not been complied with, the application for renewal must be rejected.

Minta Harper Dozier, A-27221 (Nov. 17, 1955)

A small tract lease for land classified for lease and sale will not be renewed where improvements have not been constructed on the land during the term of the original lease and the lessee has not made any showing that failure to renew the lease would work an extreme hardship upon her.

Evelyn Adams Lyon, A-27245 (Dec. 28, 1955)

SMALL TRACT ACT--Continued

RENEWAL OF LEASE--Continued

Where under the Department's regulations in effect at the time a small tract lease is issued, the lessee is given a preferential right to renewal of his lease upon timely application therefor, if it is determined that a new lease should be issued, the preferential right must be recognized even though the Department's regulations are later amended prior to the expiration of the lease to impose additional conditions for renewal and to eliminate the preferential right to renewal.

A preferential right to renewal of a small tract lease if any new lease is issued granted under the terms of the lease is a contractual preference right which must be recognized if any new lease is issued after the expiration of the term of the existing lease.

Gilbert V. Levin, A-27393 (Jan. 30, 1957)
64 I. D. 1

Where a regulation governing renewal of small tract leases is amended after the issuance of a lease and is not specifically incorporated by reference in the lease, the regulation will be deemed applicable to the lease if it confers a benefit and not an added obligation on the lessee, does not affect the rights of others, and is not detrimental to the interests of the United States.

An application for renewal of a small tract lease which has been classified for lease and sale may be approved where a showing is made that the lessee's failure to meet the requirements for sale of the tract is justified under the circumstances and that nonrenewal of the lease would work an extreme hardship on the lessee.

Henry Offe, A-27408 (Mar. 18, 1957)
64 I. D. 52

A preferential right to renewal of a small tract lease if any new lease is issued granted under the terms of the lease is a contractual preference right which must be recognized if any new lease is issued after the expiration of the term of the existing lease.

A letter to the land office from the owner of a small tract lease inquiring if he may be granted a renewal of his lease will be considered an application for renewal where under the terms of the lease the lessee is entitled to a preferential right to a renewal of the lease if it is determined that a new lease should be granted, and no specific form of application is prescribed, the only requirement being that an application for renewal must be filed not less than 60 days nor more than 6 months prior to the expiration date of the lease.

Ralph Louis Walker, A-27425 (May 7, 1957)

SMALL TRACT ACT--Continued

RENEWAL OF LEASE--Continued

An application for renewal of a small tract lease is properly rejected where the lessee fails to show that his failure to apply for the purchase of the tract is justified under the circumstances and that nonrenewal of the lease would work an extreme hardship upon him.

Cecil R. Vaughn, A-27477 (Oct. 24, 1957)

A request for an extension of a small tract lease of land classified for lease and sale cannot be granted where the request is not timely filed.

Joseph M. Czaplinski, A-27492 (Nov. 15, 1957)

A small tract lessee is not entitled to a renewal of his lease where he has failed to construct improvements on the tract as provided by the terms of the lease, and where there is no justifiable basis for excusing the failure under the circumstances or any showing that non-renewal of the lease will work an extreme hardship on the lessee.

Russell L. Coe, A-27527 (Jan. 24, 1958)

An application for the renewal of a small tract lease is properly rejected where the application is not filed prior to the expiration of the applicant's lease and there is no showing that nonrenewal will work an extreme hardship on the lessee.

Jimmie Deones, A-27539 (Feb. 11, 1958)

Where small tract leases required that applications for renewal thereof be filed not less than 60 days before the expiration of the leases, and applications for renewal were not filed until after the leases expired and after the tracts covered thereby were leased to others, protests by the former lessees against the issuance of the outstanding leases are properly dismissed.

John A. Peel et al., A-27701 (Nov. 4, 1958)

An application for the renewal of a small tract lease is properly rejected where the application is not filed prior to the expiration of the applicant's lease and there is no showing that nonrenewal will work an extreme hardship upon the lessee.

Thomas G. Myers, A-27740 (Nov. 17, 1958)

SMALL TRACT ACT--Continued

RENEWAL OF LEASE--Continued

An application for purchase of a small tract is properly rejected when it is based on a lease which was improperly renewed because the application for renewal was not filed within the period required by the lease terms and regulations in force at the time the application for renewal was filed and at the expiration of the lease term.

Dan Canak, Warren E. Portenier, A-27747 (Nov. 25, 1958)

Only the lessee under a small tract lease or his recognized assignee or successor may apply for the renewal of the lease.

Frank E. Hale, A-27741 (Dec. 18, 1958)

An application for the renewal of a small tract lease is properly rejected where the application is not filed within the time limits imposed by the terms of the lease and the applicable regulations.

Thomas P. McKeown, Mitzie Minor Beckwith, A-27793 (Jan. 16, 1959)

An application for the renewal of a small tract lease is properly rejected where the application is not filed within the time limits imposed by the terms of the lease and the pertinent regulation of the Department in effect when the lease was issued or on the form required by the regulation in effect when the lease expired.

Holbert E. Thompson et al., A-27827 (Feb. 19, 1959) 66 I. D. 51

An application for the renewal of a small tract lease is properly rejected where land has been classified for lease and sale and there is not a satisfactory showing that failure to meet the requirements for sale of the tract is justified and that nonrenewal of the lease would work an extreme hardship on the lessee.

Amandus James John Jansen, A-27883 (Apr. 20, 1959)

An application for the renewal of a small tract lease is properly rejected where the application is not filed prior to the expiration of the applicant's lease.

Herbert Webster, A-27988 (Jul. 29, 1959)

SMALL TRACT ACT--Continued

RENEWAL OF LEASE--Continued

An application for the renewal of a small tract lease is properly rejected where the application is not filed prior to the expiration of the applicant's lease.

Zanna M. Osgood, A-27980 (Aug. 3, 1959)

An application for the second renewal of a small tract lease is properly rejected in the absence of a showing of proper justification for failure to construct improvements during the renewed lease term and a showing of extreme hardship which will result from failure to renew.

Theodore D. Allen, Marshall Light Samuels, A-27975 (Aug. 4, 1959)

A small tract lessee is not entitled to a renewal of his lease where the lessee fails to show that his failure to apply for the purchase of the tract is justified under the circumstances and nonrenewal of the lease would work an extreme hardship upon him.

Ira A. Kleiner, A-27969 (Aug. 4, 1959)

A small tract lessee is not entitled to a renewal of his lease where he has failed to construct improvements on the leased land and to show that there is no justifiable basis for the failure and that nonrenewal of the lease will work an extreme hardship on him.

Jimmie L. Sellars, A-28072 (Oct. 26, 1959)

An application for renewal of a small tract lease which has been classified for lease and sale may be approved where the lessee satisfactorily shows that his failure to meet the requirements for sale of the tract is justified under the circumstances and that nonrenewal of the lease would work an extreme hardship on the lessee.

Henry Offe, A-28027 (Dec. 22, 1959)

SALES

Where an incorrect purchase price has been entered in the option to purchase provision of a Departmental Form 4-776 which is prior to the

SALES--Continued

September 1950 Form the option is void for uncertainty as the regulations are made a part of the Form and the price entered varies from the express provisions of the regulations then in force.

Where an incorrect purchase price has been entered in the option to purchase provision of such a Form the option may be withdrawn before a valid acceptance to prevent inequities or to protect the Government's interest and a corrected option must be issued.

The provision contained in Departmental Form 4-776 dated September 1950 and subsequent Forms giving a small tract lessee an option to purchase the leased premises is a gratuitous offer unsupported by consideration on the lessee's behalf.

Incorrect Purchase Price Entered in Option to Purchase Provision of Small Tract Leases, M-36315 (Mar. 7, 1956)

An application to purchase a small tract is properly rejected where the applicant has not complied with the lease provisions regarding improvements on the tract, but requirements for purchase of a small tract classified for disposal as a homesite will be modified to authorize purchase if the applicant complies with the minimum requirements in the area as to improvements on homesites where the applicant was not informed until after applying to purchase the tract that a patent would not be issued unless the structure on the tract complied with specified requirements which, in certain respects, exceeded those required of some previous patentees.

Leroy L. Scott, A-27317 (July 13, 1956)

An application by a small tract lessee to purchase the land in his lease is properly rejected where he makes a substantially false statement in his application that the application is for his own use and benefit and where in fact it appears that he has entered into an agreement with other persons whereby the latter have agreed to build, and have built, the necessary improvements on the leased land and the lessee has agreed, upon issuance of a patent, to convey to the other parties 2 acres of the leased land including the land on which the improvements are situated.

Richard P. Cossey, A-27391 (Oct. 31, 1956) 63 I. D. 360

SMALL TRACT ACT--Continued

SALES--Continued

A small tract lessee having an option to purchase the land without making improvements is not entitled to a 30-day notice under section 7 of his lease, which pertains to defaults under the lease, before he is required to file his application to purchase.

An application to purchase a small tract without making improvements is filed unreasonably late and is properly rejected where it is not filed until almost one year after the expiration of the lease term and after the land office has taken action to close the case.

Stanley C. Furlong, A-27413 (May 8, 1957)

The departmental regulation governing applications to purchase under small tract leases carrying an option to purchase is not mandatory, but only directory, as to the time when an application to purchase is to be filed.

Where the holder of a small tract lease is given an option to purchase the land without making improvements and no time limit is expressed within which he must file his application, he may file his application within a reasonable time after the term of his lease has expired.

The departmental regulation governing applications to purchase under small tract leases where improvements are made does not apply to applications to purchase which are permitted by administrative action to be made without the construction of improvements.

An application to purchase under a small tract lease, without making improvements, which is filed 25 days after the expiration of the lease term is not unreasonably late where no action has been taken to open the land to other filings and no intervening rights have attached to the land.

Albert H. Dobry, George H. Borovay, A-27387 (May 8, 1957) 64 I. D. 116

An application to purchase a small tract classified for lease and sale as a business site is properly rejected where the lessee fails to erect a substantial structure suitable for business purposes as required by the terms of his lease.

Joseph M. Czaplinski, A-27492 (Nov. 15, 1957)

SMALL TRACT ACT--Continued

SALES--Continued

Where small tract lessees in Clark County, Nevada, were offered an opportunity to purchase the tracts under lease to them without first having improved the tracts, there was no requirement that their options to purchase be exercised within a specified time and the manager had authority to grant extensions of time, beyond the expiration dates of the leases, within which the options could be exercised.

John A. Hall, Jim Swenson, A-27555 (May 6, 1958)

The Secretary of the Interior retains jurisdiction to inquire into the validity of the disposal of a small tract so long as legal title remains in the United States.

Where land has been classified as suitable for disposition by direct sale under the Small Tract Act, the sale has been held, the purchasers declared, cash certificates issued, and the purchasers have complied with all the requirements of the statute and regulation, a protest against the sale on the ground that the land was improperly classified will be entertained.

A duly authorized State agency may protest a sale of lands under the Small Tract Act.

The Secretary of the Interior may vacate the disposal of a small tract and refuse to issue patent only after proper notice and hearing.

State of Wisconsin, Robert F. Hayes, Richard A. Nebel, A-27542 (June 17, 1958)
65 I. D. 265

An application to purchase land available for purchase under the Small Tract Act is not filed in the office authorized to receive such applications until it is received in that office.

Where a small tract lessee is given an option to purchase the leased land on a basis other than that set forth in his lease but is required to file an application for purchase prior to the expiration date of his lease, he loses his right to purchase upon failure to file his application within the required time. However, where the time limitation is not required by statute or regulation, it will be waived where the delay in filing was only 2 days and the lessee acted in good faith and had a plausible basis for his late filing.

Robert J. Moore, A-27599 (July 3, 1958)

SMALL TRACT ACT--Continued

SALES--Continued

An application for purchase of a small tract is properly rejected when it is based on a lease which was improperly renewed because the application for renewal was not filed within the period required by the lease terms and regulations in force at the time the application for renewal was filed and at the expiration of the lease term.

Dan Canak, Warren E. Portenier, A-27747 (Nov. 25, 1958)

A request for reappraisal of land offered for sale under the Small Tract Act is properly denied when the applicant fails to present substantial, positive evidence that the current appraisal is erroneous.

Daniel Hicken, A-27877 (Mar. 5, 1959)

An application to purchase a small tract classified for lease and sale as a business site is properly rejected where the lessee fails to erect any improvements on the tract as required by the terms of his lease.

William H. O'Brien, A-27998 (Aug. 3, 1959)

A small tract lessee is not entitled to purchase the leased land when he has failed to construct improvements on the leased land as required by the terms of his lease.

Jimmie L. Sellars, A-28072 (Oct. 26, 1959)

SODIUM LEASES AND PERMITS

LEASES

There is no requirement in the Mineral Leasing Act or in the regulations of the Department that a preference-right sodium lease, issued as a reward for the discovery of valuable deposits of sodium under a prospecting permit, must be dated as of the date of the application for a lease.

Potash Company of America, A-27014 (Feb. 8, 1955)

LEASES--Continued

The fact that withdrawn land was erroneously included in a sodium permit does not entitle the permittee to secure a lease on the land following the making of a discovery.

Byard C. Wilburn, A-27675 (Sept. 18, 1958)

PERMITS

Applications for sodium prospecting permits are properly rejected where the applicants fail on appeal to submit any evidence which tends to disprove a determination made by the Department in a prior proceeding involving the same applicants that the lands applied for are known to contain valuable deposits of sodium and are subject to leasing only.

Frank M. Darrow, Howard W. Dougherty, A-27053, A-27057 (April 15, 1955)

A sodium prospecting permit application is properly rejected where the lands applied for are located within an area withdrawn by Executive order as an antelope range, and it appears that mining operations in the area would interfere with the purposes of the range.

Jeanette A. Bennett, A-27122 (June 28, 1955)

A sodium prospecting permit application is properly rejected where the lands applied for are located within an area withdrawn by Executive order as an antelope range, and it appears that mining operations in the area would interfere with the purposes of the range.

Trilma A. Shippen, Robert C. McCulley, A-27164, A-27165 (Aug. 19, 1955)

Upon the expiration of the term of a sodium prospecting permit, the lands it covered became immediately open to filing for a potassium prospecting permit without waiting for the expiration to be noted on the records of the land office.

J. D. Archer et al., A-27451 (June 24, 1957)

PERMITS--Continued

An application for a sodium prospecting permit is properly rejected when the applicant fails on appeal to submit any evidence which tends to disprove a determination made by the Department that the lands applied for are known to contain valuable deposits of sodium and are subject to leasing only.

Frank M. Darrow, A-27614 (July 30, 1958)

The filing of an application for a sodium prospecting permit does not confer upon the applicant an interest in the lands designated therein which defeats a subsequent withdrawal of the land before the issuance of the permit to him.

Byard C. Wilburn, A-27675 (Sept. 18, 1958)

A sodium prospecting permit application is properly rejected where the land applied for is embraced in a desert land entry and is not subject to a mineral reservation because the Geological Survey has reported that the land is not prospectively valuable for sodium.

H. Stanton Hill, A-28092 (Dec. 1, 1959)

RENTALS

Where there has been an unexplained delay of almost 4 years on the part of the Bureau of Land Management in taking action on an application for a sodium lease as a reward for the discovery of valuable deposits of sodium under a prospecting permit, it is inequitable to predate the lease to the date of the application and to compute the rentals due under the lease from that date.

Potash Company of America, A-27014 (Feb. 8, 1955)

SOIL AND MOISTURE CONSERVATION

Soil and Moisture construction projects cannot be made on mineral land where there is a valid and existing mining claim.

Soil and Moisture projects for experimental purposes as an aid to the administration of other lands are excepted from mining location since they are appropriated for a public use.

Soil and Moisture projects can be constructed on privately owned and state owned lands only where the primary purpose is for the benefit of public lands.

Conflict of Mining Claims with Existing and Proposed Soil and Moisture Projects, M-36301 (Oct. 20, 1955)

SOLDIERS' ADDITIONAL HOMESTEADS

GENERALLY

Applicants for lands selected under the soldiers' additional homestead law are not entitled to a hearing under the Administrative Procedure Act where the right of the applicant to select an additional entry is recognized and the sole issue is whether the lands selected can be properly classified as suitable for selection under the law.

Ferris F. Boothe, A-28058 (Nov. 23, 1959) 66 I. D. 395

CLASSIFICATION

An application for soldiers' additional homestead entry is properly denied where the lands applied for are heavily timbered and rough, mountainous land which could not be rendered suitable for agriculture even if the timber was removed.

In determining whether to dispose of public lands which have been withdrawn by Executive Order 6910, the Department must, pursuant to section 7 of the Taylor Grazing Act, determine both that the lands are of the type subject to disposition under the Soldiers' Additional Homestead Act and that, if they are, their disposition would be in the public interest.

Ferris F. Boothe, A-28058 (Nov. 23, 1959) 66 I. D. 395

SOLDIERS' ADDITIONAL HOMESTEADS--Continued

LANDS SUBJECT TO

Where a soldiers' additional homestead application was rejected for the reason that a part of the land applied for contained improvements of, and was occupied by, others, including Alaskan natives, as a set-net fishing site, and it is alleged on appeal that the land is not now so used or occupied and that the area is no longer open to set-net fishing, and where the record does not contain sufficient current information to make final disposition of the application, the case will be remanded to the Bureau for reconsideration.

Walter R. Wassenkari, A-27108 (April 27, 1955)

SOLICITOR, DEPARTMENT OF THE INTERIOR

The cost of legal services performed in the field by the Office of the Solicitor that represents services in connection with the reclamation program that were, prior to the transfer of the legal function from the Bureau of Reclamation to the Office of the Solicitor, charged as an item of cost to specific projects continues to be so chargeable and their reimbursability or nonreimbursability is determined by the application of the allocation and accounting procedures applicable to the particular project concerned.

Transfer of legal function relative to the reclamation program from the Bureau of Reclamation to the Office of the Solicitor did not affect the nature of the function which remains one required in and by reason of the exercise of responsibilities under the Federal reclamation laws.

Transfer of Funds to Office of the Solicitor, M-36233 (May 19, 1955) 62 I. D. 181

The Deputy Solicitor has been delegated authority to decide land appeals taken to the Secretary of the Interior and his decisions on such appeals are, in effect, decisions of the Secretary.

The Dredge Corporation, A-27429 (Supp.) (Aug. 14, 1958) 65 I. D. 336

SOUTHEASTERN POWER ADMINISTRATION

Under a contract between the Government, now represented by the Southeastern Power Administration and the Georgia Power Company, provision was made for the disposition of the entire output of the Allatoona power project to the Company, and for the operation of the Allatoona Reservoir in accordance with a mutually acceptable rule curve and instructions. The contract also provided that the Company would pay to the Government for the electrical energy equivalent of water wasted due to departure by the Company from the current rule curve and instructions not attributable to a regulation of the Corps of Engineers. In 1951, in order to meet unusual power demands of the Atomic Energy Commission, it was agreed between the parties that the power pool elevation at Allatoona should be raised from elevation 835 to 838, and kept as high as possible consistent with the emergency power demand. Although a rule curve was also prepared in connection with this operation, it was intended to be informal, and to serve merely as a guide to probable operations. The Southeastern Power Administration was aware that operations were not being conducted in accordance with the informal rule curve but acquiesced therein. In these circumstances, the provision of the contract relative to the wasting of water must be held not to have been applicable during the emergency period, and the Georgia Power Company should not have been billed for the electrical energy equivalent of the water wasted at the direction of the Corps of Engineers during the emergency period.

Appeal of Georgia Power Company, IBCA-31 (April 22, 1955)

STATE EXCHANGES

GENERALLY

A protest against approval of a State exchange application is properly dismissed where the exchange apparently meets the requirements of section 8(c) of the Taylor Grazing Act, and it is immaterial that the protestants may be permittees or licensees of the selected lands whose grazing privileges would be lost upon completion of the exchange.

L. P. Chastain et al., A-27101 (April 27, 1955)

STATE EXCHANGES--Continued

EFFECT OF APPLICATION

Unless rights have been initiated in land included in a State's application to exchange land under section 8(c) of the Taylor Grazing Act, applications for the land filed prior to the State's application cannot defeat the State's application.

Clyde H. Ault, A-27125 (Jan. 26, 1955)

The Secretary of the Interior must allow a State's application to exchange lands under section 8(c) of the Taylor Grazing Act if the State otherwise meets the requirements of that section.

Clyde H. Ault, A-27125 (Jan. 26, 1955)

L. P. Chastain et al., A-27101 (Apr. 27, 1955)

An application by a State to exchange, under section 8(c) of the Taylor Grazing Act, as amended, land withdrawn by Executive Order No. 6910 for State-owned land removes the selected land from the scope of the power conferred upon the Secretary of the Interior by section 7 of the act to classify the withdrawn land and to restore it to entry.

Joseph William Krall, A-27029 (Feb. 4, 1955)

STATE GRANTS

Lands withdrawn from mining location cannot be made subject to location by modifying the withdrawal where, after the lands were withdrawn the Fish and Wildlife Service had, pursuant to statutory authority, granted the use and control of the land to a State for use in a wildlife project unless or until the land is released by the State.

A reservation of minerals in a grant of the use and control of the surface of land to a State which merely provides that the United States, its agents or representatives may re-enter to mine and remove the minerals is not sufficiently broad to authorize the disposal of the land under the mining laws and it, therefore, would preclude the location of a mining claim.

Application of Mining Laws to Withdrawn Lands Used by a State for Wildlife Purposes, M-36407 (Jan. 25, 1957)

STATE LANDS

The bed of a navigable river does not pass to a State in its entirety upon the State's admission to the Union where prior to that time a portion of the bed was included in an Indian reservation.

Mrs. Grace F. Holbeck et al., A-27361 (Oct. 31, 1956)

Where title to land is in the State of New Mexico under a grant to the Territory of New Mexico later confirmed in the State, the land is not subject to leasing under the terms of the Mineral Leasing Act.

John E. Miles, A-27577 (June 12, 1958)

STATE LAWS

Since the incidence of the motor fuel tax levied by the State of New Mexico is on the vendor, there is no Constitutional prohibition against its inclusion in the price of motor fuel sold to agencies of the United States.

Validity of New Mexico Gasoline Tax Upon Purchases by Agencies of the United States, M-36287 (June 8, 1955)

State community property laws should not be considered in determining the acreage chargeable to a holder of oil and gas leases because (1) they are governed exclusively by Federal law, (2) since their applicability has not been authorized by Congress their application would be contrary to the Constitution of the United States, and (3) the lessee's obligation is in the nature of a contractual obligation which can only be transferred with the approval of the Secretary of the Interior.

The State laws applicable to Federal oil and gas leases are limited to those classes of laws authorized or recognized by section 32 of the Mineral Leasing Act (41 Stat. 437; 30 U.S.C. sec. 181 et seq.), as amended.

Applicability of State Community Property Laws to Federal Oil and Gas Leases With Respect to Acreage Limitations, M-36416 (Feb. 27, 1957) 64 I. D. 44

STATE LAWS--Continued

The language used in Title 15, section 301 of the Georgia Code of 1933, as amended, is inadequate to constitute State consent to land acquisitions for wildlife purposes as required by the Migratory Bird Conservation Act.

State Consent Necessary in Migratory Bird Conservation Land Acquisitions. State of Georgia Limited Consent, M-36564 (Jul. 27, 1959)

STATE SELECTIONS
(See also, School Lands, Swamplands)

Classification of land as proper for State selection under a land grant should not be refused merely because the land could also be properly classified as suitable for small-tract application.

It is the general policy of this Department that where a State selection conflicts with an attempt by a private person to obtain the same land, the State selection should ordinarily take precedence, for the reason that Congress has obligated the United States to fulfill certain statutory land grants to the States, such preferment being entirely appropriate to the dignity and importance of that obligation.

In determining whether a State selection application or a number of conflicting small-tract applications should be given preference, this Department has no reason to question the use to which the State may put the selected land if its application is allowed.

Isabel Gunnerson et al., State of Nevada, A-26952 (Feb. 11, 1955)

A State may not select mineral lands under an act passed subsequent to 1860 which grants land to that State even though the act does not, in terms, except mineral lands.

Act of June 20, 1894 (28 Stat. 94), M-36261 (Feb. 23, 1955)

State selections are to be preferred over conflicting private applications for the same land, even though the State application may have been filed subsequent to the private application. However, in order to merit preferential consideration, the State must be diligent in exercising its selection rights.

Nelson A. Gerttula, A-27325 (June 20, 1957) 64 I. D. 225

STATE SELECTIONS--Continued

Although the Department has recently announced that State selections should generally, as a matter of principle, be honored over competing private applications for the same lands, a decision rejecting a prior State selection in favor of later small tract applications will be affirmed where it is shown that, when the land was classified, the prior State selection was considered along with the applications for small tracts and it was determined that the land was more suitable for small tract disposition than for State selection, and where leases have already been issued on the land selected by the State.

State of California et al., A-27507 (Dec. 13, 1957) 64 I. D. 459

State selections are normally to be preferred over conflicting private applications for the same lands, even though the State application may have been filed subsequent to the private application. However, in order to merit preferential consideration, the State must be diligent in exercising its selection rights.

Where a State selection application is filed 8 months after the filing of a public sale application for the same land, it is concluded that the State acted with reasonable diligence to exercise its selection rights so as to merit preferential consideration of its application over the private public sale applicant.

George E. Fahey, A-27606 (Nov. 4, 1958)

State selections are to be preferred over conflicting private applications for the same land even though the State application may have been filed subsequent to the private application. However, in order to merit preferential consideration, the State must be diligent in exercising its selection right.

Where State selections are filed within 6 months after the filing of a private exchange application for the same land, and the private exchange applicants have no special equities to be considered, it is concluded that the State acted with reasonable diligence so as to merit preferential consideration of its selections.

Gerald Kolterman, Evelyn Kolterman, A-27735 (Nov. 20, 1958)

STATE TAXES

Since the incidence of the motor fuel tax levied by the State of New Mexico is on the vendor, there is no Constitutional prohibition against its inclusion in the price of motor fuel sold to agencies of the United States.

Validity of New Mexico Gasoline Tax Upon Purchases by Agencies of the United States, M-36287 (June 8, 1955)

STATUTORY CONSTRUCTION

GENERALLY

Act of May 7, 1954 (68 Stat. 78), construed as being subject to prior valid desert land entries.

Construction of the act of May 7, 1954 (68 Stat. 78), Directing Issuance of Patents to the State of Idaho for Certain Carey Act Lands, M-36255 (Jan. 10, 1955)

The restrictions on Territorial borrowing in 48 U.S.C. sec. 77 apply only to obligations which the Territory is bound to satisfy out of its funds. Since, under sections 1201 and 1202 of the Social Security Act (Public Law 567, 83d Cong., 68 Stat. 668), the Territory would not be required to use its funds to repay an advance from the Unemployment Trust Fund, the acceptance of such an advance would not be an assumption of indebtedness within the meaning of 48 U.S.C. sec. 77.

Advances to Alaska From Unemployment Trust Fund, M-36262 (Feb. 10, 1955)

The words of a statute will be given their plain meaning where to do so does not lead to an absurd or unjust result.

H. Leslie Parker, M. N. Wheeler, A-27066 (Mar. 18, 1955) 62 I. D. 88

An intent to exclude Indians from a general act of Congress must be definitely expressed.

Application of the Mine Inspection Provisions of Title II of the Federal Coal Mine Safety Act to Mines on Indian Lands, M-36312 (Oct. 21, 1955)

STATUTORY CONSTRUCTION--Continued

GENERALLY--Continued

The benefits of section XI of the act of September 3, 1954, may not be extended to Indians who own no land within the taking area of the Oahe Dam project.

Section XI of the act of September 3, 1954, does not authorize the purchase of lands in a trust status as a substitute for land in the taking area of the Oahe project which is held by an individual member of the Cheyenne River Sioux Tribe in unrestricted fee simple ownership. Memorandum Opinion of March 2, 1955, reconsidered and affirmed.

Under section XI of the act of September 3, 1954 (68 Stat. 1191), lessee Indians within the taking area of the Oahe Dam and reservoir project must continue to pay rent during the period the lands continue to be used under the provisions of this section.

Interpretation of the Cheyenne River Act of September 3, 1954 (68 Stat. 1191), M-36323 (Jan. 12, 1956) 63 I. D. 7

Under the established rules of statutory construction, the last sentence in section 3 of the act of June 4, 1954 (68 Stat. 173), cannot be construed as effective retroactively so as to terminate restrictive provisions in patents issued under the act of June 14, 1926 (44 Stat. 741; 43 U.S.C. sec. 869), which had been outstanding for 25 years when the amendatory act of June 4, 1954, was passed.

Effect of Act of June 4, 1954 (68 Stat. 173), Upon Certain Restrictive Provisions Contained in Patents Issued Under the Act of June 14, 1926 (44 Stat. 741; 43 U.S.C. sec. 869), M-36330 (Feb. 6, 1956)

Where Congress, over a long period of time, has consistently spelled out in detail the conditions under which it has granted the right to extensions of oil and gas leases or the limitations on that right are apparent, departure from that practice, which would result in an illogical and apparently unjustifiable grant, justifies an examination of available extraneous aids, including the legislative history of the law for the purpose of testing the language of the law against the intent of its enactment. If it is clear that the intent was different than the language implies, then such a construction will be given to it as appears justified as a result of such examination. So construed, paragraph (6) of the act of July 29, 1954, authorizes extensions for undeveloped portions of leases created by one or more partial assignments of a lease in

STATUTORY CONSTRUCTION--Continued

GENERALLY--Continued

its extended term because of any other provision of the Mineral Leasing Act but does not authorize such extensions because of partial assignments of leases which are in their extended term pursuant to said paragraph (6).

A clear expression of Congress is required to justify a construction of a statute which would reverse a general policy of the Government as declared in numerous statutes and where a system of related general provisions has been enacted with respect to a particular subject, new enactments of a fragmentary nature on the subject are to be taken as intended to fit into the existing system.

Whether the Grant of an Extension to Assigned Undeveloped Portions of Leases in Their Extended Terms Because of Any Provision of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 181), as Amended by the Act of July 29, 1954 (68 Stat. 585), Includes an Extension of a Lease Because of an Assignment Made Within an Extended Term Pursuant to That Grant, M-36432 (May 13, 1957) 64 I. D. 127

A proviso will be applied to all sections of an act if it can be determined that that was the legislative intention. A savings clause preserves rights and liabilities accrued, duties imposed, and penalties incurred from the operation of a repeal statute. The appropriate office of a proviso is to restrict or modify the enacting clause and not to enlarge it or confer a power.

Yearly Rentals on Mining Claims Validly Initiated Before the Date of the Act of May 27, 1955, Within the Papago Indian Reservation, Arizona, M-36441 (June 25, 1957)

Unrepealed provisions of earlier laws having specific application cannot be infused with new life for the purpose of implementing later law.

Proposed Contract Between the United States and the Kings River Conservation District, M-36457 (July 10, 1957) 64 I. D. 273

Where an act vests the Secretary of the Interior with discretionary authority but directs him to issue regulations governing the exercise of his discretion, the authority of his delegate to act in any given time must be exercised conformable to the regulation then in force.

Leasing of Oil and Gas Deposits Under Rights-of-Way, M-36465 (Aug. 9, 1957)

STATUTORY CONSTRUCTION--Continued

GENERALLY--Continued

The special act of March 4, 1931 (46 Stat. 1547), and the provisions of section 24 of the Federal Water Power Act are both part of the integrated system of public land laws and it would not comport with the usual rule of construction to assume that the former operated to vacate a reservation created by the latter in circumstances where that was not necessary to the primary purpose of the later act, in the absence of a clear intent to do so.

Effect of Section 2 of the Act of March 4, 1931 (46 Stat. 1547), Upon the Right to Locate Non-Metalliferous Minerals Within Power Site Reserve No. 696, M-36453 (Aug. 15, 1957)

The amendment to section 31 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 181), by the act of July 29, 1954 (68 Stat. 585; 30 U.S.C., Supp. IV, sec. 188), providing for automatic termination of a lease, not containing a well capable of production, for nonpayment of the annual rental, when considered in connection with the text of the act which it amends, and its purpose is not considered to apply to a failure timely to pay the second annual rental for the extended 5-year period where notice of the extension was not mailed to the lessee in time for him to receive it and return the rental so that it would be received not later than the seventh anniversary date of the lease.

Effect of the Law Providing for the Automatic Termination of an Oil and Gas Lease on Which There is no Well Capable of Producing Oil and Gas in Paying Quantities Upon the Extension of Such a Lease Prior to Timely Notice of the Extension, M-36458 (Aug. 15, 1957) 64 I. D. 333

When the construction of a part of an act in accordance with the apparent meaning of its text considered alone would not only cause a departure from a long-continued procedure and a system established by a series of laws, but result in an inconsistency in the act itself, it is competent to examine matters aliunde the text including other contemporary legislation upon which the act is known to have been patterned to determine the true meaning of the text as well as the intent of the legislative assembly which enacted it. Thus, where it would require one agency to assume a part of the cost of operations for which the law has appropriated funds to another agency but not other, related costs also covered by the same appropriation, resort will

STATUTORY CONSTRUCTION--Continued

GENERALLY--Continued

be had to appropriate extraneous aids to construction to ascertain the true intent of such provision.

Inclusion of Overhead Expenses in Billings to Forest Service Under Section 5(a), Act of July 23, 1955 (69 Stat. 367; 30 U.S.C., 1952 ed., Supp. IV, Sec. 601), M-36466 (Aug. 28, 1957) 64 I. D. 348

The general rule that a statute may not be retroactively construed so as to affect vested possessory rights or titles is not applicable to recording statutes provided a reasonable time is allowed for recording.

The rule that where no penalty is provided in a statute, none can be assessed is not universal. It must be weighed in the light of the language of the statute granting a right or imposing an obligation. In particular, statutes dealing with the public lands place a responsibility upon the Secretary to see that they are enforced. Even though they have neglected to specifically fix that responsibility in him, it falls there naturally because of general statutes vesting authority in him over the public lands.

Construction of Recording Requirement of Section 4, Act of August 11, 1955 (69 Stat. 681; 30 U.S.C. sec. 623), M-36429 (Oct. 30, 1957) 64 I. D. 393

Section 1(7) of the act of July 29, 1954, is applicable only to those leases which are extended subject to the statutory condition that the extended lease is subject to the rules and regulations in force at the expiration date of the initial 5-year term of the lease. It does not apply where the extension attaches as a matter of right pursuant to an unconditional grant of Congress upon the happening of a named event. In such case, the right runs from the date of the lease, although it does not attach until the named event occurs.

Application of Section 1(7), Act of July 29, 1954 (68 Stat. 583; 30 U.S.C. sec. 188), to Oil and Gas Leases in their Extended Term Under Various Extension Provisions of the Mineral Leasing Act, M-36490 (Jan. 8, 1958)

In determining the intention of the legislature as to whether a statute is to operate retrospectively or prospectively only, the courts have evolved a strict rule of construction against retrospective application and indulge in the presumption, in the absence of clear expression to the contrary, that the legislature intends statutes or amendments thereof to operate prospectively only.

STATUTORY CONSTRUCTION--Continued

GENERALLY--Continued

A statute should not be applied retroactively where the intent of the legislature to have it so apply is not clearly shown and where, in addition such retroactive application would take away property rights entitled to protection under the Constitution.

Stanley Odlum and Avila Oil Company, A-27502 (Jan. 13, 1958) 65 I. D. 25

There is no general statutory authority for the construction of fish hatcheries and the acquisition of lands therefor sufficient to overcome a point of order directed to an item in a general appropriation bill making funds available for the establishment and construction of a fish hatchery. The act of August 14, 1946 (60 Stat. 1080; 16 U. S. C. secs. 661-666c), commonly known as the Coordination Act, authorizes the appropriation of funds for the construction of fish hatcheries and other facilities where such facilities are necessary for the economical administration of areas made available to the Secretary of the Interior under the act.

Statutory Authority for Construction of Fish Hatcheries, M-36498 (Feb. 11, 1958)

The act of August 11, 1955 (69 Stat. 681; 30 U. S. C. secs. 621-625), requiring that a copy of a location notice be filed for record in the land office, contemplates an instrument which describes the land and where under State law the location notice is not required to do so but the location certificate is required to do so, a copy of the location certificate, duly filed, meets the intent of the law.

Mineral Locations on Power Site Withdrawals--Act of August 11, 1955 (69 Stat. 681; 30 U. S. C. Secs. 621-625), M-36468 (Mar. 6, 1958)

The appropriation of funds to finance the completion of the Pleasant Valley investigation is clearly authorized by existing law.

Section 2 of the Reclamation Act of June 17, 1902 (32 Stat. 388; 43 U. S. C. sec. 391), section 9 of the Reclamation Project Act of August 4, 1939 (53 Stat. 1187; 43 U. S. C. sec. 485), the Flood Control Act of December 22, 1944 (58 Stat. 887), and intermediate legislation have been considered as authority for the investigation of works having physical and functional purposes either related or not directly related to irrigation.

Authorization for Bureau of Reclamation to Investigate Pleasant Valley Development, M-36505 (Mar. 28, 1958) 65 I. D. 129

STATUTORY CONSTRUCTION--Continued

GENERALLY--Continued

If a provision of a State constitution is reasonably susceptible of more than one interpretation, that interpretation will be adopted which will save the provision from conflict with the Constitution of the United States.

Classification of the First Senators From the State of Alaska in Regard to their Initial Term of Office, M-36522 (July 30, 1958)

Courts will look to the reason for a statute's enactment and antecedent history and give it effect in accordance with its design and purpose, sacrificing if necessary its literal interpretation in order that the statute's overall purpose will not fail.

The appropriation of funds by Congress with knowledge of an administrative position assumed by the responsible executive agency, and in the absence of any inconsistent action by the Congress, may be considered in support of the administrative position taken.

Responsibility of the Secretary of the Interior Under the Flood Control Act of 1944 for Irrigation Functions at Dam and Reservoir Projects Operated Under the Direction of the Secretary of the Army, M-36475 (Nov. 1, 1957) 65 I. D. 525

/This opinion was not released until Dec. 15, 1958, the date of the Attorney General's opinion regarding it. See 65 I. D., p. 549./

Section 8(d) of the act of July 7, 1958 (72 Stat. 339), the Alaska Act of Admission into the Union as a State, when it provided that all of the laws of the United States shall have the same force and effect within the State of Alaska as elsewhere within the United States included in those laws, laws that apply only to Alaska at the time of its admission as a State and where as of that time a special law applicable only to Alaska covers the whole of any particular field which is also covered by a general law, the special law will continue to operate rather than the general law, by the force of the provisions of section 8, unless repealed in terms or by clear implication. Thus the Alaska Coal Leasing Act of October 20, 1914 (38 Stat. 741; 48 U. S. C., sec. 32), continues to be the law applicable to the disposition of coal deposits belonging to the United States and the coal leasing provisions of the act of February 25, 1920, do not apply to them.

Applicability of the Coal Leasing Provisions of the Act of February 25, 1920 (41 Stat. 437; 30 U.S.C., Sec. 181 et seq.) as Amended, to the State of Alaska, M-36551 (Feb. 4, 1959)

STATUTORY CONSTRUCTION--Continued

GENERALLY--Continued

The provision of section 1(7) of the act of July 29, 1954 (68 Stat. 585; 30 U. S. C. sec. 188), excepting from the penalty therein provided oil and gas leases on which there is a well capable of producing oil or gas in paying quantities has no application to unitized oil and gas leases no part of which is situated within the participating area of the unit because the presumption that those leases are producing leases applies only for the purposes stated in the preceding paragraph and has no effect on the rental requirements of such leases or on the penalty fixed by law for a violation of such requirements

Automatic Termination of Unitized Leases for Failure to Pay Rentals, M-36531 (Supp.) (Jul. 20, 1959)

Where an act of Congress confirms without limitation or condition a grant of land made by a former sovereign, the grant cannot be construed as a mere right to cut the timber from the land.

Floyd A. Wallis et al., A-26944 (Aug. 4, 1959)

Where the plain language of a statute does not limit the benefit conferred thereby and where to give effect to such language would not lead to absurd or unfair results, there is no basis for departing from that language even though it seems to be broader than the probable intent of the Congress.

Richfield Oil Corporation, A-27954 (Aug. 12, 1959) 66 I. D. 292

ADMINISTRATIVE CONSTRUCTION

Act of May 11, 1938 (52 Stat. 345), as amended, did not contemplate that title to Columbia River fishery facilities constructed on State-owned lands would pass to the States.

Ownership of Big Creek Fish Hatchery and Other Facilities, M-36294 (Sept. 12, 1955) 62 I. D. 364

The question whether, and the manner in which, minerals, reserved under the Small Tract Act of June 1, 1938, should be disposed of requires an administrative construction of the act. So construed in the light of the general policy of the Congress it is concluded that the

STATUTORY CONSTRUCTION--Continued

ADMINISTRATIVE CONSTRUCTION--Continued

minerals are subject to disposal, that "applicable law" as used in the act means the mining law and the mineral leasing laws each within its own scope.

Whether Titanium Minerals in Land Covered by Small Tract Leases or Patents will Become Subject to Lease upon Promulgation by the Secretary of the Interior of the Regulations Authorized by the Act of June 1, 1938 (52 Stat. 609; 43 U. S. C. sec. 682b), M-36308 (Oct. 28, 1955)

The fund appropriated to the Secretary of the Interior under section 8 of Public Law 478 (83d Cong., 2d sess.), 68 Stat. 452, is to be expended "for the purpose of relocating the members of the Yankton Sioux Tribe * * * in a manner that will reestablish and protect their economic, social, religious, and community life." A proposed plan of evenly dividing the funds between qualified families and disbursing to them on the basis of family programs is not authorized by the act. The language of the act indicates that the funds should be equitably distributed on the basis of need.

Interpretation of Section 8 of Public Law 478 (83d Cong., 2d sess.), 68 Stat. 452, M-36319 (Jan. 5, 1956)

Under the act of August 14, 1955 (69 Stat. 725), the phrase "development or utilization of natural resources" cannot be construed to authorize the granting of mining or oil and gas leases. Interpreting the language of the act as a whole, natural resource development is involved only insofar as it is done to implement any of the purposes for which leases may be granted as specified therein.

Mining Leases on Unassigned Lands Located on the Colorado River Reservation, M-36327 (Jan. 19, 1956)

A long continued and uniform administrative interpretation of a statute is entitled to great weight in its construction, particularly where Congress has accepted, and acted upon the basis of, the administrative interpretation.

Max Barash, The Texas Company, A-27239 (Feb. 14, 1956) 63 I. D. 51

STATUTORY CONSTRUCTION--Continued

ADMINISTRATIVE CONSTRUCTION--Continued

Even if applicable to Indian lands, the provisions of the Soldiers' and Sailors' Civil Relief Act, which protect the rights of persons in the military service from forfeiture or prejudice, would not apply to action taken under a permit on Indian lands to reduce the area of the permit where the permit expressly provides for such a reduction at any time in the discretion of the Commissioner of Indian Affairs since such action does not result from any failure by the permittee to do any act that he might have done if he had not been in the military service.

The act of October 17, 1940 (54 Stat. 1187, 50 U.S.C. App. sec. 561), commonly known as the Soldiers' and Sailors' Civil Relief Act, has no application to leases or permits on Indian lands.

Applicability of Soldiers' and Sailors' Civil Relief Act to Grazing Leases and Permits on Indian Lands, M-36335 (Mar. 15, 1956)

In section 22 of the Klamath Termination Act (68 Stat. 723; 25 U.S.C. sec. 564u) the words "any other contract heretofore approved" do not apply to tribal loan contracts. The operation of section 20 which permits the Secretary to set off certain funds against the entire indebtedness of a borrower at the time he withdraws from the tribe is not an abrogation of the contract which would be prohibited under section 22. A necessary requirement to obtain a tribal loan is membership in the tribe and when the membership is ended by the member's voluntary election he consents among other things to settlement of his loan account.

Interpretation of Sections 20 and 22 of Klamath Termination Act as Applied to the Tribal Indebtedness of Withdrawing Members, M-36337 (Mar. 26, 1956)

Funds appropriated for the rehabilitation of the members of the Cheyenne River Tribe under section V of the act of September 3, 1954 (68 Stat. 1191), are not to be withdrawn from this use for the purpose of reconstructing a road system or other facility maintained by the Bureau of Indian Affairs. The relocating of such road systems is to be undertaken by the Corps of Engineers as provided in section IV of the act and the cost of relocation is to be charged against the cost of construction of the Oahe project.

Section IV of the act of September 3, 1954 (68 Stat. 1191), authorizes the Secretary of the Army to make available from appropriated sums to be charged against the cost of construction of

STATUTORY CONSTRUCTION--Continued

ADMINISTRATIVE CONSTRUCTION--Continued

the Oahe project additional appropriations which shall be expended for the relocation and reconstruction of roads and bridges on the Cheyenne River Reservation. Under this section the Corps of Engineers is required to furnish a road system which will restore the transportation facility equivalent to that available to the Indians before the flooding. A mere replacement of number of bridges and miles of road flooded, without consideration of the site at which the Indians relocate themselves, is not sufficient.

Interpretation of Section IV, Public Law 776 (68 Stat. 1191), Re Responsibility for Construction of Roads on Cheyenne River Reservation, M-36347 (May 31, 1956)

The act of August 15, 1953 (67 Stat. 590; 18 U.S.C. sec. 1157), does not nullify local ordinances duly passed by Indian tribal councils, nor does it impose additional limitations on the tribe's authority to control by permit the removal of any livestock kept on the reservation. However, under this act, the superintendent may only issue permits for sale of restricted livestock.

Attempted Ordinance by Fort Hall Business Council re Permits for Sale of Livestock and Branding, M-36363 (Aug. 24, 1956)

The act of March 29, 1956 (70 Stat. 62), clarifies and makes definite the authority to approve mortgages given the Secretary of the Interior and his duly authorized representative under prior acts. Certificates of indebtedness giving rise to a State statutory lien against real property for public assistance granted are not deemed to be mortgages which may be approved under authority of this act.

Interpretation of Act of March 29, 1956 (70 Stat. 62), as to Use of Approved Mortgages or Certificates of Lien on Indian Trust Lands for Enforcing Reimbursements of Public Assistance Grants in Montana to Indians, M-36370 (Nov. 29, 1956)

Administrative rulings and practices cannot enlarge the application of the opinion of the Associate Solicitor dated October 22, 1947 (M-35004), which advised that full payment of the reimbursable costs by a district relieved the excess lands in that district from the statutory restrictions on supplying water to such lands.

STATUTORY CONSTRUCTION--Continued

ADMINISTRATIVE CONSTRUCTION--Continued

Administrative rulings cannot thwart the plain purpose of a valid law nor can prior administrative practice remedy an absence of lawful authority.

Proposed Contract Between the United States and the Kings River Conservation District, M-36457 (July 10, 1957) 64 I. D. 273

The statutes have been construed administratively and by the Congress in appropriating funds and authorizing projects as permitting the Interior Department to conduct project investigations for one or more multiple purposes either related or not directly related to irrigation.

Authorization for Bureau of Reclamation to Investigate Pleasant Valley Development, M-36505 (Mar. 28, 1958) 65 I. D. 129

Where the Department places a different interpretation on an act of Congress from that previously adopted, its decision announcing the new interpretation of the statute is to be given prospective application only and actions previously taken in extending oil and gas leases under the overruled interpretation of the statute will not be disturbed.

Franco Western Oil Company et al., A-27607 (Supp.) (Sept. 30, 1958) 65 I. D. 427

In apportioning Federal funds for wildlife restoration purposes under section 4 of the Pittman-Robertson Act (50 Stat. 918; 16 U.S.C. 669c), as amended, the Secretary of the Interior should include as "license holders of each State" all individuals to whom a State has issued one or more licenses; he should not include all licenses issued by a State when, under State law, more than one license may be issued to a single individual.

In apportioning Federal funds for wildlife purposes under section 4 of the Pittman-Robertson Act the Secretary of the Interior, acting through such rules and regulations as he deems appropriate, is entitled to require from each State to which he apportions funds, a duly executed certificate of the number of license holders in the State before he determines the amount of the annual sums payable to that State under the Act.

Interpretation of Section 4 of the Pittman-Robertson Act (50 Stat. 918; 16 U.S.C., sec. 669c), as Amended, M-36560 (Jun. 4, 1959) 66 I. D. 219

STATUTORY CONSTRUCTION--Continued

IMPLIED REPEALS

The inclusion of Alaska within the ambit of the Social Security Act has freed the Territory pro tanto from any restriction against accepting advances from the Unemployment Trust Fund established under that act which might otherwise have been contained in 48 U.S.C. sec. 77.

Advances to Alaska From Unemployment Trust Fund, M-36262 (Feb. 10, 1955)

A general provision in a statute for the repeal of inconsistent statutes does not repeal a provision of an earlier statute if the two provisions have no "positive repugnancy."

Right-of-Way Provisions of the Federal Aid Highway Act of November 9, 1954, and the Federal Aid Highway Act of 1956, M-36366 (Aug. 28, 1956)

Repeal by implication is not favored, and if two constructions are possible that one will be adopted which operates to support the earlier act, rather than to repeal it by implication. Also, there can be no repeal by implication where the act expressly provides for continued operation of prior acts.

Yearly Rentals on Mining Claims Validly Initiated Before the Date of the Act of May 27, 1955, Within the Papago Indian Reservation, Arizona, M-36441 (June 25, 1957)

The power site reserve in 1931 was a legislative withdrawal, in part created by act of Congress. If section 2 of the act of March 4, 1931 (46 Stat. 1547), revoked it, that revocation amounted to a repeal of section 24 of the Federal Water Power Act to the extent that it applied to these lands.

Effect of Section 2 of the Act of March 4, 1931 (46 Stat. 1547), Upon the Right to Locate Non-Metalliferous Minerals Within Power Site Reserve No. 696, M-36453 (Aug. 15, 1957)

The homestead entry and mineral reservation provisions of the Stockraising Homestead Act were impliedly repealed by the Taylor Grazing Act except as to entries existing when the latter act was passed.

Mineral Reservations in Patents to be Issued Under the Act of March 31, 1950 (64 Stat. 39; 43 U.S.C., 1952 ed., sec. 375b-375f), M-36583 (Sept. 29, 1959)

STATUTORY CONSTRUCTION--Continued

LEGISLATIVE HISTORY

Act of May 11, 1938 (52 Stat. 345), as amended, did not contemplate that title to Columbia River fishery facilities constructed on State-owned lands would pass to the States.

Ownership of Big Creek Fish Hatchery and Other Facilities, M-36294 (Sept. 12, 1955) 62 I. D. 364

Although the legislative history of an act of Congress may not be drawn upon to establish a meaning or intent contrary to the clear language of the act, this rule is without application where the legislative history supports, rather than disregards, the clear language of the statute.

Interpretation of the Cheyenne River Act of September 3, 1954 (68 Stat. 1191), M-36323 (Jan. 12, 1956) 63 I. D. 7

Where Congress, over a long period of time, has consistently spelled out in detail the conditions under which it has granted the right to extensions of oil and gas leases or the limitations on that right are apparent, departure from that practice, which would result in an illogical and apparently unjustifiable grant, justifies an examination of available extraneous aids, including the legislative history of the law for the purpose of testing the language of the law against the intent of its enactment. If it is clear that the intent was different than the language implies, then such a construction will be given to it as appears justified as a result of such examination. So construed, paragraph (6) of the act of July 29, 1954, authorizes extensions for undeveloped portions of leases created by one or more partial assignments of a lease in its extended term because of any other provision of the Mineral Leasing Act but does not authorize such extensions because of partial assignments of leases which are in their extended term pursuant to said paragraph (6).

Whether the Grant of an Extension to Assigned Undeveloped Portions of Leases in Their Extended Terms Because of Any Provision of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 181), as Amended by the Act of July 29, 1954 (68 Stat. 585), Includes an Extension of a Lease Because of an Assignment Made Within an Extended Term Pursuant to That Grant, M-36432 (May 13, 1957) 64 I. D. 127

A proviso will be applied to all sections of an act if it can be determined that that was the legislative intention. A savings clause preserves rights and liabilities accrued, duties

STATUTORY CONSTRUCTION--Continued

LEGISLATIVE HISTORY--Continued

imposed, and penalties incurred from the operation of a repeal statute. The appropriate office of a proviso is to restrict or modify the enacting clause and not to enlarge it or confer a power.

Yearly Rentals on Mining Claims Validly Initiated Before the Date of the Act of May 27, 1955, Within the Papago Indian Reservation, Arizona, M-36441 (June 25, 1957)

Subsection (d)(5) of section 1 of the act of April 22, 1954 (68 Stat. 57), as amended by the act of July 11, 1956 (70 Stat. 529; 43 U.S.C., 1952 ed., Supp. IV, sec. 870), which requires that when at the time rents, royalties, and bonuses accrue, the lands or deposits covered by a single lease are owned in part by the State and in part by the United States, they shall be allocated between them in proportion to the acreage in the lease owned by each, applies only during such period as the single lease is an outstanding, valid lease embracing both State and Federal lands or deposits. When the lease terminates in any manner in its entirety, or terminates or is assigned as to all of the State land, or as to all of the Federal land, subsection (d)(5) ceases to be operative with respect to the land in the lease.

Construction of Subsection (d)(5), Act of April 22, 1954 (68 Stat. 57), as Amended July 11, 1956 (70 Stat. 529; 43 U.S.C., 1952 ed., Supp. IV, sec. 870), M-36460 (July 30, 1957)

Where an act clearly authorizes the Secretary of the Interior to take action when he determines that such action would be in the public interest and the only qualification on that authority is that he is directed to issue regulations governing such action resort to the legislative history or other extraneous aids to construction in an effort to so construe the law as to shear the Secretary of all discretion is not authorized.

Leasing of Oil and Gas Deposits Under Rights-Of-Way, M-36465 (Aug. 9, 1957)

A reservation of land in furtherance of a public purpose will not be deemed to have been vacated by an act passed thereafter where the purpose of the act may be served without revoking the reservation and the legislative history discloses no intention to do so and the text of the law does not, in terms, revoke it.

Effect of Section 2 of the Act of March 4, 1931 (46 Stat. 1547), Upon the Right to Locate Non-Metalliferous Minerals Within Power Site Reserve No. 696, M-36453 (Aug. 15, 1957)

STATUTORY CONSTRUCTION--Continued

LEGISLATIVE HISTORY--Continued

When the question arises whether a statute is mandatory or directory, it is necessary to determine the intent of Congress and when resort to the legislative history shows not only that the purpose to be served requires a construction that the statute is mandatory but evidence of a positive intent to make it so it must be treated as such.

Construction of Recording Requirement of Section 4, Act of August 11, 1955 (69 Stat. 681; 30 U. S. C. sec. 623), M-36429 (Oct. 30, 1957) 64 I. D. 393

Where apparent administrative construction of a bill contained in a report to the congressional committee in charge of the bill is accompanied by a proposed clarifying and limiting amendment upon which Congress takes no action and the law considered as a whole reasonably warrants a different construction more consistent with the apparent intent of Congress the latter will be adopted particularly when subsequent administrative practice conforms to it rather than to the prior administrative construction.

Authority to Extend a Segregated Lease for 2 Years From the Date of Discovery of Oil or Gas in Paying Quantities During an Extended Term on any Other Segregated Portion of the Lands Originally Subject to the Same Lease, M-36472 (Nov. 20, 1957)

Where an act, in apparently mandatory language, requires the filing of a location notice for record within 60 days after the date of location of land in a power site reserve, it is competent to examine the legislative history to see if it supports the conclusion that it was intended to make the requirement a mandatory one. The acceptance by Congress of the administrative determination of language by the agency designated to administer the law if enacted and the enactment of the bill without change in the language or evidence of an intent to have the language construed otherwise is persuasive that it should be construed as mandatory.

Where Congress, by enacting the language in a bill without change, adopts an administrative construction that failure to comply with a certain provision (if the bill becomes a law) "will render the claim null and void," it will be assumed that the result indicated was the result Congress intended.

Mineral Locations on Power Site Withdrawals--Act of August 11, 1955 (69 Stat. 681; 30 U. S. C. Secs. 621-625), M-36468 (Mar. 6, 1958)

STATUTORY CONSTRUCTION--Continued

LEGISLATIVE HISTORY--Continued

The statutes have been construed administratively and by the Congress in appropriating funds and authorizing projects as permitting the Interior Department to conduct project investigations for one or more multiple purposes either related or not directly related to irrigation.

Authorization for Bureau of Reclamation to Investigate Pleasant Valley Development, M-36505 (Mar. 28, 1958) 65 I. D. 129

The literal terms of individual provisions of an entire act cannot be isolated and adhered to blindly, but the act must be construed as a whole to give effect to the intent of the legislature, and legislative materials are an appropriate aid in determining such intent.

Responsibility of the Secretary of the Interior Under the Flood Control Act of 1944 for Irrigation Functions at Dam and Reservoir Projects Operated Under the Direction of the Secretary of the Army, M-36475 (Nov. 1, 1957) 65 I. D. 525

/This opinion was not released until Dec. 15, 1958, the date of the Attorney General's opinion regarding it. See 65 I. D., p. 549. 7

The legislative history of the Hawaii Statehood Act clearly shows that Congress authorized the Territorial Governor to continue to discharge the duties of his Territorial office while seeking elective office in the new State government.

Applicability of the Hatch Act to the Governor of the Territory of Hawaii, M-36576 (June 12, 1959) 66 I. D. 281

The legislative history of section 20 of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), makes it clear that the act revoked the withdrawals of coal land made under authority of section 2 of the act of October 20, 1914 (38 Stat. 742; 48 U.S.C., sec. 433).

Proposed Public Land Order Opening Coal Reserves in Alaska, M-36572 (Aug. 20, 1959)

STOCK-RAISING HOMESTEADS

Where stock-raising homestead entries were properly canceled after due notice to the entryman, he does not apply for reinstatement until over 12 years later, and he does not establish facts justifying reinstatement of his entries, action on reinstatement will nevertheless be suspended where it appears that the entryman may have placed improvements worth up to $19,000 on the land and there are no adverse interests in the land; and the case will be remanded for a determination of the facts as to the improvements.

Since the enactment of the Taylor Grazing Act, stock-raising homestead entries cannot be amended to include additional land.

Heirs of Albert Peter Mracek, Alford Roos, A-27051 (April 13, 1955)

An entry of land under the Stockraising Homestead Act segregates the land entered into two separate estates--the surface and the mineral.

Devearl W. Dimond, A-27131 (July 5, 1955) 62 I. D. 260

Where a patent was issued in 1919 containing a mineral reservation to the United States of all minerals under the Stockraising Homestead Act of December 29, 1916, and the patentee accepted the patent without objection, a supplemental patent without a mineral reservation as to part of the land as to which the reservation may have been erroneously imposed will not be issued where the patentee did not object and the successor to the patentee has held title for 24 years without protest and the Department has issued an oil and gas lease for the land involved.

Conrad Luft, A-27246 (Feb. 13, 1956) 63 I. D. 46

Filing an application for designation of land as suitable for stock-raising homestead entry and settlement on the land before it was withdrawn from entry and settlement and reserved for classification under the Taylor Grazing Act did not result in a valid right to a stock-raising homestead entry thereon where the land was not designated as suitable for such entry.

Conrad J. Yede, A-27534 (Jan. 24, 1958)

STOCK-RAISING HOMESTEADS--Continued

The Stock-raising Homestead Act of December 29, 1916 (39 Stat. 862; 43 USC 291-301) as amended, does not in terms, refer to Alaska.

The Stock-raising Homestead Act of 1916, as amended, is held to be locally inapplicable to Alaska and is therefore not extended to Alaska by section 3 of the Act of August 24, 1912 (37 Stat. 512; 48 USC 23). Nor is it so extended by the fact of Alaskan statehood, since the 1916 act does not now apply to Alaska nor will it so apply at the time of the admission of the State of Alaska into the Union under the provisions of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339-352).

Applicability to Alaska of the Stock-Raising Homestead Act of December 29, 1916 (39 Stat. 862; 43 USC 291-301) as Amended, M-36537 (Nov. 25, 1958)

An application for a stockraising homestead in Alaska is properly rejected on the ground that the statute authorizing allowance of stockraising homesteads is not applicable to Alaska.

Yule Kilcher, A-28013 (Aug. 10, 1959)

The homestead entry and mineral reservation provisions of the Stockraising Homestead Act were impliedly repealed by the Taylor Grazing Act except as to entries existing when the latter act was passed.

Mineral Reservations in Patents to be Issued Under the Act of March 31, 1950 (64 Stat. 39; 43 U. S. C., 1952 ed., sec. 375b-375f), M-36583 (Sept. 29, 1959)

SUBMERGED LANDS

The settled law applicable to tidelands and submerged lands adjacent to incorporated territories of the United States is equally applicable to the unincorporated territory of Guam.

As a general rule, navigable waters and the soils under them, which is to say tidelands and submerged lands, adjacent to the unincorporated territories of the United States are held in trust by the United States for the use of all of the people, and are not to be granted away in the absence of specific authorization by the Congress.

Abutting upland property owners may not assert a claim of title, as against the United States, to either submerged lands or tidelands adjacent to Guam; nor may they assert similar claims of title as to land which results from the filling of submerged lands or tidelands by such owner, his predecessor, or the United States.

The courts have not differentiated between tidelands and submerged lands, on the one hand, and lands resulting from the filling of such lands on the other, with regard to the acquisition of title to the latter by abutting upland property owners.

Rights of Abutting Upland Property Owners to Claim Title to Reclaimed Land Produced by Filling on Tidelands and Submerged Lands Adjacent to the Territory of Guam, M-36449 (Jan. 31, 1958) 65 I. D. 193

The regulation (43 CFR 192.42(d)(2)), which fixes a minimum area of 640 acres for oil and gas lease offers unless a less area is surrounded by lands not available for leasing does not apply to submerged lands excluded from the upland by meander lines of the public survey unless such submerged lands have been determined to be beneath waters that are not navigable.

Applicability of 43 CFR 192.42(d)(2) to Beds of Non-Navigable Waters Adjacent to Public Lands, M-36512 (July 29, 1958)

In view of the vesting of title in the State of Alaska to tidal and submerged lands within 3 geographical miles of its coastline under the Submerged Lands Act of 1953, extended to Alaska by section 6(m) of the Statehood Act, the Secretary of the Interior now has no authority to withdraw any portion of those lands for a wildlife refuge.

Authority of the Secretary of the Interior to Withdraw, for a Wildlife Refuge, a Portion of the Tidal and Submerged Lands Within Three Geographical Miles of the Coastline of Alaska, M-36562 (Aug. 21, 1959)

SUBMERGED LANDS ACT

GENERALLY

The Submerged Lands Act (67 Stat. 29), by its express terms, precludes the application of its provisions to territories of the United States.

Rights of Abutting Upland Property Owners to Claim Title to Reclaimed Land Produced by Filling on Tidelands and Submerged Lands Adjacent to the Territory of Guam, M-36449 (Jan. 31, 1958) 65 I. D. 193

SURPLUS PROPERTY

Where withdrawn public lands which had been declared surplus under the 1944 Surplus Property Act were transferred by the War Assets Administration to a State for wildlife purposes pursuant to 16 U.S.C. sec. 667b and the reserved minerals transferred to the Interior Department for administration under the public land laws, the surface is no longer withdrawn public land. The reserved nonleasable minerals are not subject to location under the mining laws because of the unavailability of the surface.

Availability of a Non-Leasable Mineral (Tungsten) in Former Ft. Huachuca Military Reservation, Arizona, M-36256 (Jan. 18, 1955)

The former owner of land condemned by the United States in 1942 has no preference right under existing law to reacquire the land should it now be declared surplus.

Albert J. DeLange et al., A-27277 (Jan. 4, 1956)

The Department of the Interior has been designated as disposal agency for Government-owned power and communication facilities under the jurisdiction of the Interior Department which have a total estimated fair market value of $1,000 or more. The Secretary of the Interior has the responsibility of disposing of such telephone lines on Indian reservations by advertising and competitive bid or by negotiation, in his discretion, after he has determined them excess to

SURPLUS PROPERTY--Continued

the needs of the Department and, as the designee of the Administrator of the General Services Administration, has determined them surplus to the needs of the Government.

Sale of Government-owned Telephone Line and Associated Equipment on the Blackfeet Reservation, M-36359 (Nov. 29, 1956)

Where an application for a special use permit for land and the improvements on it has been rejected for the reason that it has been determined that the improvements are excess to the needs of the Department and are to be disposed of in accordance with the provisions of the Federal Property and Administrative Services Act, the rejection will not be disturbed in the absence of any showing of error in the rejection.

George Gilbertson et al., A-27456 (July 1, 1957)

SURVEYS OF PUBLIC LANDS

GENERALLY

An island which was stable land in the Yellowstone River when Montana became a State did not pass to the State upon its admission to the Union but remained public land subject to disposition under the public land laws.

When in the course of a survey the banks of a river are meandered, the area within the meander lines is segregated from the survey and an island within the meander lines, otherwise unsurveyed, is not surveyed public land.

Northern Pacific Railway Company, Ralph L. Bassett, A-27114 (Oct. 20, 1955)
62 I. D. 401

Although the Secretary of the Interior may survey any public lands which have been erroneously omitted from a survey, a plat of survey once accepted is presumed to be correct and will not be disturbed except upon clear proof of fraud or gross error and an application for a survey of omitted land, in such circumstances, is properly rejected.

Grayce R. Hiler, A-27370 (Dec. 19, 1956)

SURVEYS OF PUBLIC LANDS--Continued

GENERALLY--Continued

Where the area alleged to have been omitted from a survey consists of a relatively narrow strip of land along the edge of a meandered river and where the meander lines in general follow the river, the land was in a remote area and of little value when surveyed, and it is obvious that the river was intended to be the boundary, the water's edge will be accepted as the boundary and no claim will be made that the allegedly omitted lands are public lands.

Although the Secretary of the Interior may determine that lands have been erroneously omitted from a survey, a plat of survey once accepted will not be disturbed except upon clear proof of fraud or gross error.

Ralph L. Bassett, Edwin J. Keyser, A-27372 (May 20, 1957)

Islands which were stable lands in the Snake River when Idaho was admitted to the Union did not pass to the State but remained public lands subject to disposition under the public land laws.

The Secretary of the Interior is authorized to survey islands in a river in existence when a State was admitted to the Union where it appears that they were erroneously omitted from the original survey of the township and meanders of the river.

Willis W. Ritter et al., A-27755 (Dec. 22, 1958)

An oil and gas lease offer is properly rejected as to surveyed lands which are not described in conformity with the most recent plat of survey.

Doris L. Ervin et al., A-28106 (Nov. 20, 1959)
66 I. D. 393

AUTHORITY TO MAKE

After land has been surveyed and patented by the United States, the boundaries cannot be changed by a resurvey to the prejudice of the patentee.

Nelson D. Jay, A-27468 (Dec. 4, 1957)

SURVEYS OF PUBLIC LANDS--Continued

DEPENDENT RESURVEYS

In a dependent resurvey of public land an obliterated quarter corner may be established by testimony which indicates that an existing fence corner marks the position of and has been accepted as the quarter corner for an extended period of years.

Sunrise Development Co., Atom Ore Uranium Co., A-28026 (Aug. 19, 1959)

SWAMPLANDS

Where the weight of the evidence is that lands were not swamplands in 1850, a State's selection of those lands under the act of September 28, 1850, must be denied.

Land which is subject to periodic overflow is not "swamp and overflowed" land within the meaning of the act of September 28, 1850.

Where the field notes of a survey do not prima facie show the swamp character of the land, the burden of proof is on the State to show that the land falls within the grant of September 28, 1850.

If land selected by a State under the grant of September 28, 1850, was in fact swampland in 1850, subsequent action by the Government in reserving the land for other purposes was of no effect.

The grant to States of swamplands made by the act of September 28, 1850, was a grant in praesenti but a State's title to particular land does not become perfect until the land has been identified and patent therefor issued.

State of Louisiana, Department of the Army and Shell Oil Company, Protestants, A-27345 (Mar. 4, 1957)

Where a swampland selection by the State of Louisiana has been denied by departmental decision, after previous departmental decisions indicated that the land was swamp in character in 1850, and where the heirs of the patentee of the State indicate that they have evidence that the land was, in fact, swamp in character in 1850, the departmental decision denying the selection will be suspended to afford the State and the heirs of the patentee an opportunity to present such evidence.

State of Louisiana, Department of the Army and Shell Oil Company, Protestants, Heirs of Charles F. Lefeaux, Interveners, A-27345 (Aug. 28, 1957)

SWAMPLANDS--Continued

Where a decision of the Department denying a swamp land selection by the State of Louisiana has been suspended to afford the State and interveners, who claim under a patent from the State, a further opportunity to present evidence as to the character of the selected lands and where the evidence presented does not establish the fact that the lands selected by the State were swamp lands in 1850, the suspended decision will be reinstated as the final determination of the Department that the State is not entitled to receive a patent for the selected lands.

State of Louisiana, Department of the Army and Shell Oil Company, Protestants, Heirs of Charles F. Lefeaux, Interveners, A-27345 (Supp.) (May 14, 1958)

Where a State swampland selection conflicts with a prima facie valid oil and gas lease, the swampland application will not be allowed until the State has established the swamp character of the land either in a contest brought against the oil and gas lease or at a hearing ordered by the Department at which the State will have the burden of proof.

State of Louisiana, Thomas Connell, A-27817 (Jan. 30, 1959)

Unsurveyed school sections found upon survey to be swamp in character pass to the State of Wisconsin, in accordance with the general rule, if at all, under the school grant and not the later swampland grant.

State of Wisconsin, A-27844 (Apr. 1, 1959) 66 I. D. 136

TAYLOR GRAZING ACT

GENERALLY

Section 1 of the Taylor Grazing Act, as amended, does not authorize the holder of a lieu selection right to select withdrawn land in satisfaction of his right.

TAYLOR GRAZING ACT--Continued

GENERALLY--Continued

The right to select unappropriated public land in lieu of land relinquished under the acts of July 1, 1898, and May 17, 1906, cannot be satisfied unless the land selected, if withdrawn, is determined, pursuant to the provisions of section 7 of the Taylor Grazing Act, as amended, to be proper for the satisfaction of the lieu right.

Nelson A. Gerttula, A-27325 (June 20, 1957)
64 I. D. 225

Section 5 of the Taylor Grazing Act does not establish an absolute right, for all time and in all circumstances, to a free-use license.

Opinions Relating to Fence Construction and Free-Use Licenses on the Federal Range, M-36521 (June 27, 1958) (Memorandum from Field Solicitor, Salt Lake City, Utah, to State Supervisor for Utah, Bureau of Land Management.)

The Taylor Grazing Act does not require that rules for the administration of grazing districts created thereunder be uniform in all cases and where land withdrawn in aid of proposed legislation for the benefit of Indians and placed under the administration of the Commissioner of Indian Affairs is included within such a grazing district, special rules for the administration of the district may be adopted with the concurrence of the Commissioner of Indian Affairs.

Betty Ruth Wright et al., A-27519 (Nov. 14, 1958)

CLASSIFICATION

Where subsequent to the time an application for a homestead entry is filed there are filed small tract applications for the same land, the later applications can be considered in determining whether the land should be classified as suitable for homestead entry pursuant to section 7 of the Taylor Grazing Act.

Darwin M. Cecil, Joseph Casaletto, A-27047 (Jan. 14, 1955)

TAYLOR GRAZING ACT--Continued

CLASSIFICATION--Continued

An application by a State to exchange, under section 8(c) of the Taylor Grazing Act, as amended, land withdrawn by Executive Order No. 6910 for State-owned land removes the selected land from the scope of the power conferred upon the Secretary of the Interior by section 7 of the act to classify the withdrawn land and to restore it to entry.

Joseph William Krall, A-27029 (Feb. 4, 1955)

Absent a showing that water is available to land which will not, without irrigation, produce an agricultural crop, it is improper to classify the land as more valuable or suitable for the production of agricultural crops than it is for grazing purposes.

Walter E. Scott, A-27293 (June 21, 1956)

In exercising the discretionary authority vested in him by section 7 of the Taylor Grazing Act, as amended, the Secretary may properly consider and weigh all factors which have a bearing on the suitability of the land for use or disposal, including the effect on the public interest.

As a general rule, the first application filed for the classification of land under section 7 of the Taylor Grazing Act, as amended, is entitled to prior consideration over subsequent applications for the same land.

The fact that land may be suitable for disposition under the first application filed therefor does not require the land to be classified for such disposition if the land is more suitable for other disposition.

State selections are to be preferred over conflicting private applications for the same land, even though the State application may have been filed subsequent to the private application. However, in order to merit preferential consideration, the State must be diligent in exercising its selection rights.

Nelson A. Gerttula, A-27325 (June 20, 1957)
64 I. D. 225

Although the Department has recently announced that State selections should generally, as a matter of principle, be honored over competing private applications for the same lands, a decision rejecting a prior State selection in favor of later small tract applications will be

CLASSIFICATION--Continued

affirmed where it is shown that, when the land was classified, the prior State selection was considered along with the applications for small tracts and it was determined that the land was more suitable for small tract disposition than for State selection, and where leases have already been issued on the land selected by the State.

Good administrative practice requires that when land is classified for disposal in a manner which precludes the allowance of applications for the land previously filed those applications be rejected immediately and sufficient time be permitted to elapse to allow the applicants to take appeals from the adverse classification before action is taken by the local office which will result in rights attaching to the classified land under later applications.

State of California et al., A-27507 (Dec. 13, 1957) 64 I. D. 459

State selections are normally to be preferred over conflicting private applications for the same lands, even though the State application may have been filed subsequent to the private application. However, in order to merit preferential consideration, the State must be diligent in exercising its selection rights.

Where a State selection application is filed 8 months after the filing of a public sale application for the same land, it is concluded that the State acted with reasonable diligence to exercise its selection rights so as to merit preferential consideration of its application over the private public sale applicant.

George E. Fahey, A-27606 (Nov. 4, 1958)

Where State selections are filed within 6 months after the filing of a private exchange application for the same land, and the private exchange applicants have no special equities to be considered, it is concluded that the State acted with reasonable diligence so as to merit preferential consideration of its selections.

State selections are to be preferred over conflicting private applications for the same land even though the State application may have been filed subsequent to the private application. However, in order to merit preferential consideration, the State must be diligent in exercising its selection right.

Gerald Kolterman, Evelyn Kolterman, A-27735 (Nov. 20, 1958)

TAYLOR GRAZING ACT--Continued

CLASSIFICATION--Continued

Where a tract of public land is valuable for timber management and the State has a major timber management program covering the area, the land is not of the character which should be classified under the Taylor Grazing Act as proper for disposal in satisfaction of individual lieu selection rights.

Jack E. Carl, Greta Elwert, A-27870, A-27900 (Apr. 23, 1959)

Where a tract of land is valuable for the production of timber and is a part of a sustained yield management program, the land is not of the character which should be classified under the Taylor Grazing Act as proper for disposal in satisfaction of individual lieu selection rights.

Donald R. Wheeler et al., A-27927 (Jun. 15, 1959)

The determination of the proper classification of land under section 7 of the Taylor Grazing Act, as amended, is discretionary with the Secretary of the Interior and there is no requirement of law that such a determination shall be based upon a record compiled at a hearing, but applicants for entry of land which is subject to classification under section 7 may submit evidence in support of their applications, which evidence is considered in classifying the land.

Max J. Curtis, A-27843 (Aug. 11, 1959)

In determining whether to dispose of public lands which have been withdrawn by Executive Order 6910, the Department must, pursuant to section 7 of the Taylor Grazing Act, determine both that the lands are of the type subject to disposition under the Soldiers' Additional Homestead Act and that, if they are, their disposition would be in the public interest.

Ferris F. Boothe, A-28058 (Nov. 23, 1959) 66 I. D. 395

TERRITORIES

The chief executives of the territories and the Trust Territory of the Pacific Islands are without authority to obtain excess property, ownership of which is vested in the name of such governments.

TERRITORIES--Continued

The Department of the Interior is without authority under section 108, Interior Department Appropriation Act, 1953 (66 Stat. 445, 460), to obtain excess equipment, material, and supplies without reimbursement for the Governments of Alaska, Hawaii, Puerto Rico, the Virgin Islands, and Guam, but it may obtain such property for the Governments of American Samoa and the Trust Territory of the Pacific Islands.

Transfer of Excess Property and Disposition of Surplus Property to the Territories and the Trust Territory of the Pacific Islands, M-36222 (Sept. 29, 1955)

The settled law applicable to tidelands and submerged lands adjacent to incorporated territories of the United States is equally applicable to the unincorporated territory of Guam.

The Submerged Lands Act (67 Stat. 29), by its express terms, precludes the application of its provisions to territories of the United States.

As a general rule, navigable waters and the soils under them, which is to say tidelands and submerged lands, adjacent to the unincorporated territories of the United States are held in trust by the United States for the use of all of the people, and are not to be granted away in the absence of specific authorization by the Congress.

In view of the controlling legal principles relative to tidelands and submerged lands adjacent to a territory of the United States, the language of the Guam Organic Act (48 U. S. C., 1952 ed., sec. 1421f) and transfers of land made pursuant thereto, may not be construed as vesting title or administration of tidelands or submerged lands, filled or otherwise, in the Government of Guam in the absence of specific authorization by the Congress.

Abutting upland property owners may not assert a claim of title, as against the United States, to either submerged lands or tidelands adjacent to Guam; nor may they assert similar claims of title as to land which results from the filling of submerged lands or tidelands by such owner, his predecessor, or the United States.

Rights of Abutting Upland Property Owners to Claim Title to Reclaimed Land Produced by Filling on Tidelands and Submerged Lands Adjacent to the Territory of Guam, M-36449 (Jan. 31, 1958) 65 I. D. 193

TIDELANDS

The settled law applicable to tidelands and submerged lands adjacent to incorporated territories of the United States is equally applicable to the unincorporated territory of Guam.

As a general rule, navigable waters and the soils under them, which is to say tidelands and submerged lands, adjacent to the unincorporated territories of the United States are held in trust by the United States for the use of all of the people, and are not to be granted away in the absence of specific authorization by the Congress.

Abutting upland property owners may not assert a claim of title, as against the United States, to either submerged lands or tidelands adjacent to Guam; nor may they assert similar claims of title as to land which results from the filling of submerged lands or tidelands by such owner, his predecessor, or the United States.

The courts have not differentiated between tidelands and submerged lands, on the one hand, and lands resulting from the filling of such lands on the other, with regard to the acquisition of title to the latter by abutting upland property owners.

Rights of Abutting Upland Property Owners to Claim Title to Reclaimed Land Produced by Filling on Tidelands and Submerged Lands Adjacent to the Territory of Guam, M-36449 (Jan. 31, 1958) 65 I. D. 193

TIMBER AND STONE ACT

An application to enter a portion of the public domain under the terms of the Timber and Stone Act must be rejected in view of the fact that that act has been repealed by an act of Congress and the Secretary of the Interior has no longer any authority to make any disposition of the public domain under the repealed act.

Roy Francis Nesbit, A-27331 (June 18, 1956)

TIMBER SALES AND DISPOSALS

The authority of the Bureau of Land Management to sell timber on public lands does not extend to timber on valid unpatented mining claims. Only when a claim has been determined to be invalid in accordance with the Rules of Practice and applicable law may the Bureau dispose of the timber.

Authority of the Bureau of Land Management to Sell Timber on an Unpatented Mining Claim, M-36265 (Mar. 11, 1955)

The basic authority for the Secretary of the Interior to sell timber on Indian reservations is set forth in section 7 of the act of June 25, 1910 (36 Stat. 857; 25 U.S.C. sec. 407). Sale of timber on the Klamath Reservation will continue to be governed by the regulations implementing the act of June 25, 1910, until such time as tribal title is extinguished by sale or the tribal property is conveyed to a trustee, corporation or other legal entity in accordance with a plan to be prepared by management specialists pursuant to the Klamath terminal legislation (the act of August 13, 1954, 68 Stat. 718; 25 U.S.C. sec. 564).

Authority for Continued Approval of Timber Sales on Klamath Reservation, M-36338 (May 29, 1956) 63 I. D. 147

Where the printed form of contract for the sale of materials under the act of July 31, 1947, provides two alternative methods for determining the total price to be paid for the materials, one under which the total price is to be specifically stated in the contract and the other under which the total price is to be determined on the basis of the materials actually removed, and where a contract for the sale of timber was executed on that form from which the second method for determining the price had been stricken, the purchaser's obligation under the contract is to pay the total price specified in the contract, notwithstanding the fact that another, inconsistent, paragraph of the printed form was not deleted from the contract as it should have been.

Russell & Pugh Lumber Company, A-27432 (May 20, 1957)

Section 4 of the act of July 23, 1955 (69 Stat. 368; 30 U.S.C. sec. 612), is applicable to valid mill site locations made after the act. The restrictions and limitations of section 4 are applicable to valid mill site locations made prior to the act only if in accordance with section 6 thereof the owners waive and relinquish all rights in conflict with those restrictions and limitations. The owner of a valid mill site location may cut and remove the timber on the claim for the purpose of constructing thereon a mill, reduction

works, tramway, or other accessories required in the development of his mineral interests but he may not cut the timber for the purpose of selling it.

Effect of Section 4 of the Act of July 23, 1955 (69 Stat. 368; 30 U.S.C. sec. 612), on Mill Site Locations--Timber on Mill Sites, M-36451 (July 22, 1957) 64 I. D. 301

TORTS

GENERALLY

The United States is not liable under the Federal Tort Claims Act for damages sustained after its responsibility to maintain roads on the Menominee Indian Reservation has terminated.

Legal Obligations of the Federal Government on Menominee Roads, M-36300 (Aug. 2, 1955)

ASSUMPTION OF RISK

Under general principles of tort law, the United States is not liable to a visitor, whether a business visitor or a gratuitous licensee, to an area forming part of the National Park system for bodily harm caused by any dangerous condition, whether natural or artificial, on the land, if the visitor knows of the condition and realizes the risk involved or if the Government exercises reasonable care to give adequate warning of the condition and the risk involved.

Claim of Mrs. Kathryn L. Rogers, TA-125 (May 31, 1956) 63 I. D. 150

CONTRIBUTORY NEGLIGENCE

Under the laws of California, the driver of a vehicle which is overtaking and passing another vehicle has the duty to ascertain that the passing may be made safely, and the failure to fulfill this duty constitutes contributory negligence.

TORTS--Continued

CONTRIBUTORY NEGLIGENCE--Continued

Under the laws of California, the driver of a vehicle making a left turn has the duty to take the precautions which a reasonably prudent person would take under the circumstances reasonably appearing to him at the time, but does not have the duty to ascertain that the left turn may be made in absolute safety.

Appeal of Pacific Greyhound Lines, TA-130 (May 25, 1956)

LICENSEES AND INVITEES

A visitor to an area forming part of the National Park system is, under ordinary circumstances, a licensee by invitation or permission, but is not a business visitor, even though the park is one where a fee is charged.

Under general principles of tort law, a visitor to an area forming part of the National Park system is not entitled to compensation for bodily harm resulting from a fall on a park trail if the physical condition of the trail and the extent of risk involved in its use were so apparent that the trail would not have been hazardous for persons traversing it with a reasonable degree of care for their own safety.

Under general principles of tort law, the United States is not liable to a visitor, whether a business visitor or a gratuitous licensee, to an area forming part of the National Park system for bodily harm caused by any dangerous condition, whether natural or artificial, on the land, if the visitor knows of the condition and realizes the risk involved or if the Government exercises reasonable care to give adequate warning of the condition and the risk involved.

Claim of Mrs. Kathryn L. Rogers, TA-125 (May 31, 1956) 63 I. D. 150

MOTOR VEHICLES

Under Maryland and Virginia law, where employee in the operation of a motor vehicle, resulting in personal injuries or property damage, had departed from the scope of his employment and was engaged solely upon his own personal affairs no liability attaches to the

TORTS--Continued

MOTOR VEHICLES--Continued

employer for negligence of the employee under the doctrine of respondeat superior. Section 401 et seq., Title 40 D. C. Code, 1951 ed. (49 Stat. 166, 168) that imposes liability for personal injuries or property damage on the owner of a motor vehicle for the acts of any person who drives it with his consent, and making proof of ownership prima facie evidence that person operating vehicle with owner's consent, must be defined by judicial determination made in a manner giving effect to the objects and purposes of the statute. The doctrine of principal and agent applies in the District of Columbia.

Use of Motorcycles by U.S. Park Police Between Residence and Duty Station, M-36268 (April 11, 1955)

Under the laws of California, the driver of a vehicle making a left turn has the duty to take the precautions which a reasonably prudent person would take under the circumstances reasonably appearing to him at the time, but does not have the duty to ascertain that the left turn may be made in absolute safety.

Under the laws of California, the driver of a vehicle which is overtaking and passing another vehicle has the duty to ascertain that the passing may be made safely, and the failure to fulfill this duty constitutes contributory negligence.

Appeal of Pacific Greyhound Lines, TA-130 (May 25, 1956)

NOTICE

Under general principles of tort law, the United States is not liable to a visitor, whether a business visitor or a gratuitous licensee, to an area forming part of the National Park system for bodily harm caused by any dangerous condition, whether natural or artificial, on the land, if the visitor knows of the condition and realizes the risk involved or if the Government exercises reasonable care to give adequate warning of the condition and the risk involved.

Claim of Mrs. Kathryn L. Rogers, TA-125 (May 31, 1956) 63 I. D. 150

TORTS--Continued

PARKS

A visitor to a public park in the District of Columbia is, under ordinary circumstances, a licensee, and it is the duty of the Government to warn him of any known dangerous conditions. Where the Government had no notice that a grating over a sidewalk had become loose because the securing screws were missing and such defect was not discoverable by due diligence, the United States is not liable for an alleged injury sustained by a visitor who tripped and fell over the grating, after it had been tilted by the visitor's companion stepping on one end.

Claim of Isaac Notes, T-711 (May 17, 1955)

Under general principles of tort law, a visitor to an area forming part of the National Park system is not entitled to compensation for bodily harm resulting from a fall on a park trail if the physical condition of the trail and the extent of risk involved in its use were so apparent that the trail would not have been hazardous for persons traversing it with a reasonable degree of care for their own safety.

The rights and duties of private persons within a National Park Service area over which the United States has acquired exclusive jurisdiction are governed solely by Federal law, but the law in force within the area immediately prior to the transfer of jurisdiction is considered to have been adopted by the Federal Government to the extent that it is not inconsistent with the changed legal situation brought about by the transfer or with any Federal enactment or purpose, whether existing at the time or subsequently adopted.

Under general principles of tort law, the United States is not liable to a visitor, whether a business visitor or a gratuitous licensee, to an area forming part of the National Park system for bodily harm caused by any dangerous condition, whether natural or artificial, on the land, if the visitor knows of the condition and realizes the risk involved or if the Government exercises reasonable care to give adequate warning of the condition and the risk involved.

Claim of Mrs. Kathryn L. Rogers, TA-125 (May 31, 1956) 63 I. D. 150

The Federal law, by which the rights and duties of private persons within a National Park Service area over which the United States has acquired exclusive jurisdiction are solely governed, encompasses State Laws that have been made applicable to such area by act of Congress. Consequently, tort claims arising out of accidents within a National Park Service area over which the United States has acquired exclusive jurisdiction are to be determined in accordance with State laws if the subject matter of the claim

TORTS--Continued

PARKS --Continued

is covered by a statute, such as the act of February 1, 1928 (45 Stat. 54; 16 U.S.C. sec. 457), that adopts State laws as the Federal rule of decision.

Application of State Laws to Accidents Within Areas Over Which the United States has Acquired Exclusive Jurisdiction, M-36414 (Feb. 1, 1957)

PERSONAL INJURY OR DEATH

Under Maryland and Virginia law, where employee in the operation of a motor vehicle, resulting in personal injuries or property damage, had departed from the scope of his employment and was engaged solely upon his own personal affairs no liability attaches to the employer for negligence of the employee under the doctrine of respondeat superior. Section 401 et seq., Title 40 D.C. Code, 1951 ed. (49 Stat. 166, 168) that imposes liability for personal injuries or property damage on the owner of a motor vehicle for the acts of any person who drives it with his consent, and making proof of ownership prima facie evidence that person operating vehicle with owner's consent, must be defined by judicial determination made in a manner giving effect to the objects and purposes of the statute. The doctrine of principal and agent applies in the District of Columbia.

Use of Motorcycles by U.S. Park Police Between Residence and Duty Station, M-36268 (April 11, 1955)

PROPERTY DAMAGE

The Government may be held liable pursuant to the provisions of the Federal Tort Claims Act under State law imposing absolute liability in blasting operations. Under the judicial decisions of the State of South Dakota, one who engages in blasting is absolutely liable to a property owner whose property is damaged as a result of concussion, irrespective of distance or the nature of the blasting operations.

Claim of Mrs. Pauline Mitchell, T-698 (Feb. 15, 1955)

TORTS--Continued

PROPERTY DAMAGE--Continued

Under Maryland and Virginia law, where employee in the operation of a motor vehicle, resulting in personal injuries or property damage, had departed from the scope of his employment and was engaged solely upon his own personal affairs no liability attaches to the employer for negligence of the employee under the doctrine of respondeat superior. Section 401 et seq., Title 40 D.C. Code, 1951 ed. (49 Stat. 166, 168) that imposes liability for personal injuries or property damage on the owner of a motor vehicle for the acts of any person who drives it with his consent, and making proof of ownership prima facie evidence that person operating vehicle with owner's consent, must be defined by judicial determination made in a manner giving effect to the objects and purposes of the statute. The doctrine of principal and agent applies in the District of Columbia.

Use of Motorcycles by U.S. Park Police Between Residence and Duty Station, M-36268 (April 11, 1955)

14 Comp. Dec. 310 permits payment for repairs to Government-owned property to be made directly to establishment making repairs by party causing damage.

3617 Revised Statutes (31 U.S.C. sec. 484) requires that all monies received from whatsoever sources for the use of the United States be deposited in the Treasury as miscellaneous receipts, unless otherwise provided by law.

Payment for Repair of Damage to Government Property, M-36383 (Apr. 26, 1956)

SCOPE OF EMPLOYMENT

The very heart and substance of the Federal Tort Claims Act is to be found in the words "scope of his office or employment" and they should not be wrenched out of their context, as they are precisely limited in it to the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the state where the property damage or injury occurs.

Use of Motorcycles by U.S. Park Police Between Residence and Duty Station, M-36268 (April 11, 1955)

TOWNSITES

Under the Townsite Laws (43 U. S. C. sec. 718), the lands must already be settled upon and occupied as townsites; however, a city or town could be established under the Townsite Laws (43 U. S. C. sec. 713) where "parties may hereafter desire to found," a city or town on the public lands.

A city not set up under the Townsite Laws cannot extend its boundaries under the Townsite Laws.

Public Law 522, 84th Congress, 2d Session (70 Stat. 156) and Application of the Townsite Laws (43 U. S. C. secs. 711-728; 43 CFR 255.9-255.54), M-36486 (Oct. 30, 1957)

The offering of lands at public sale under section 2455 of the Revised Statutes, as amended, which authorizes the sale of certain isolated or rough or mountainous tracts, is properly vacated where the land consists of townsite lots which are subject to sale under the statutory provisions governing the public sale of townsites.

Mrs. Willo M. Chandler, A-27992 (Aug. 4, 1959)

TRESPASS

GENERALLY

Where a person has been an innocent trespasser on public lands and has made improvements on the land and the land is to be disposed of to another person, the trespasser should be allowed a reasonable time within which to remove any improvements that can be removed without substantial damage to the land or the improvements, and the person acquiring the land should be required as a condition precedent to acquiring the land to reimburse the innocent trespasser for the reasonable value of all permanent improvements which are left on the land and which are of value to the person acquiring the land.

Lee Kisner et al., A-27189 (Nov. 7, 1955)

TRESPASS--Continued

GENERALLY--Continued

The taking of sand and gravel from a mining location perfected after July 23, 1955, by one with knowledge of the existence and date of location of the claim, is a willful trespass.

Disposal of Sand and Gravel From Unpatented Mining Claims, M-36467 (Aug. 28, 1957)

A grazing licensee who grazes a number of animals in excess of the number covered by his existing grazing license is properly charged with wilful trespass upon the public domain and subjected to disciplinary reduction of his grazing license where the circumstances do not comport with the notion that he acted in good faith and innocent mistake.

J. Leonard Neal, A-27922 (Jun. 4, 1959) 66 I. D. 215

MEASURE OF DAMAGES

The taking of sand and gravel from a mining location perfected after July 23, 1955, by one with knowledge of the existence and date of location of the claim, is a willful trespass.

Disposal of Sand and Gravel From Unpatented Mining Claims, M-36467 (Aug. 28, 1957)

The grazing of an excess number of cattle within an area covered by an individual grazing allotment constitutes a trespass on public land even though a portion of the area is privately-owned land enclosed by a fence and damages for such trespass are properly computed on the basis of the number of cattle in excess of the allotment, the length of such unauthorized grazing, and a reasonable charge for the forage thus consumed.

J. Leonard Neal, A-27922 (Jun. 4, 1959) 66 I. D. 215

UNITED STATES

Under section 9 of the act of August 13, 1954 (68 Stat. 718), (1) all trust and restricted property of members of the Klamath Tribe who die 6 months or more after the date of the act is subject to the probate jurisdiction of State courts; (2) if the State court orders a sale of such property in order to pay claims and probate expenses, the purchaser whether Indian or non-Indian, takes a fee simple title to the property sold; (3) if the court distributes such property to an Indian heir, such heir acquires the property in a trust or restricted status unless such status has been removed by operation of said act; but if the distributee or devisee is a non-Indian, the trust and restricted status is removed; (4) if the court decides it would be advantageous to cause a trust or restricted allotment to be leased during the period of probate, it must be leased in accordance with Federal rules and regulations; (5) the court, in probating such property, may appoint guardians ad litem to protect the interests of minors, incompetents or persons non compos mentis; (6) where the court orders a sale of such trust or restricted property, the United States is a necessary party to the proceedings therefor, and must be served with the petition for sale and accorded an opportunity to be heard. Service should be made upon the U. S. Attorney and upon the Attorney General of the United States; (7) heirs or devisees of Klamath Indians need not be qualified by the 1/16th degree Indian blood of the Klamath Tribe as formerly required; (8) trust and restricted estates of Klamath Indians who died prior to February 13, 1955, will be probated by the Federal Examiner of Inheritance and not by a State court.

Klamath Terminal Legislation, M-36284 (May 20, 1955) 62 I. D. 186

VETERANS' PREFERENCE

As neither Executive Order No. 10585, nor Proclamation No. 3080 terminated the Korean conflict, neither had any effect upon preference rights and other benefits accorded veterans by the act of September 27, 1944 (58 Stat. 747), as amended (43 U. S. C. secs. 279-284).

Termination of Korean Conflict, M-36376 (Aug. 1, 1955)

VETERANS' PREFERENCE --Continued

A veteran who requests the revocation of an order of withdrawal is not by virtue of his request entitled to a preference right of entry over other veterans in the event that the withdrawal is revoked.

Alma Everett Morris, Jr., et al., A-27235 (Dec. 12, 1955)

Where both husband and wife, individually, are each qualified veterans by reason of their respective services in the armed forces, each is entitled to the benefits of the Veterans' Preference Act of 1944 (43 U.S.C. secs. 279-284), as amended, so far as those benefits relate to the small tract program. In the absence of other objection, each such spouse may file a preference right application and each may participate in a veterans' preference drawing for small tracts. Where only one spouse is a veteran, either the veteran or the spouse, with the consent of the veteran, may exercise the preference right or participate in a veterans' preference drawing for small tracts.

Preference Right of Veteran and Spouse; Small Tract Act (43 U.S.C. sec. 682a-e), as Amended, M-36427 (Feb. 19, 1957)

VIRGIN ISLANDS

GENERALLY

The obligation or expenditure by the Government of the Virgin Islands of matching funds in an amount exceeding that approved by the Secretary of the Interior contravenes a statutory restriction and the irregularity cannot be cured by retrospective approval.

Although the aggregate obligations of matching funds have exceeded the limit set by the Secretary, he may approve the expenditure from a budgetary reserve of such funds for a purpose for which any given obligation was made where the over-obligation is not attributable to a specific obligation or several specific obligations.

Obligation and Expenditures of Matching Funds--Virgin Islands, M-36293 (July 13, 1955)

VIRGIN ISLANDS --Continued

LEGISLATURE

Payment of per diem and travel expenses for special sessions to members of the Virgin Islands Legislature entitled thereto represents an obligation of the United States.

Payment of Per Diem and Travel Expenses For Special Sessions of the Virgin Islands Legislature, M-36439 (May 1, 1957)

Members of the Legislature of the Virgin Islands who are entitled to per diem under section 6(e) of the Revised Virgin Islands Organic Act may receive per diem only for such days as they are physically present in actual sessions of the Legislature.

The Virgin Islands Legislature is in "actual session" when the roll is called and a quorum is present.

Per Diem Entitlement of Members of the Virgin Islands Legislature, M-36438 (May 1, 1957) 64 I. D. 181

VOTING

The first United States Senators elected to represent the State of Alaska following its admission into the Union should be chosen without distinction in regard to length of time they are to serve in their initial term of office.

Classification of the First Senators From the State of Alaska in Regard to their Initial Term of Office, M-36522 (July 30, 1958)

Indians and other native inhabitants of Alaska are eligible to vote in the primary, general, and special elections to be held in the process of preparing Alaska for Statehood.

Effect of the Alaska Statehood Act on the Suffrage Rights of Indians and Other Native Inhabitants Residing on Indian Trust Lands in Alaska, M-36524 (Aug. 15, 1958)

WAIVER

Where an applicant's notice of location of settlement of an Alaska headquarters site is rejected on the ground that the land involved has been classified for disposal under the Small Tract Act and therefore is not subject to other forms of entry, but the manager allows the appellant the right to either appeal his decision or file a small tract application, and the applicant does not appeal but instead files a small tract application which is junior in time to another small tract application, the appellant by failing to appeal from the manager's decision thereby waived any rights he may have had under his location notice and the land will be awarded to the first qualified small tract applicant.

William D. Cunningham, Alice F. McGrath, A-27297 (May 28, 1956)

Where there is no substantial evidence that an oil and gas offeror acquiesced without protest in a drawing to determine priority of filing of oil and gas offers, including his own, the Department will not hold that he has lost his statutory preference right to a lease earned by reason of his having been the first applicant for the lease.

Edith M. Kasper, Blanche V. White, A-27821 (Feb. 4, 1959)

WATERS AND WATER RIGHTS

STATE LAWS

Under the second opinion of the Arizona Supreme Court in the case of Bristor v. Cheatham, percolating waters are not subject to the doctrine of prior appropriation but only to the doctrine of reasonable use.

Validity of Desert Land Applications and Entries in Arizona Dependent on Percolating Water for Reclamation, M-36263 (Feb. 23, 1955) 62 I. D. 49

In Oregon, desert land entries may be allowed when based on appropriation of percolating waters for beneficial use. In Colorado, a desert land entry may be allowed if based on an appropriation of underground waters in the absence of evidence overcoming the presumption that the waters are tributary to a stream. In California, appropriation of percolating waters surplus to the needs of overlying landowners and the correlative rights of overlying landowners to percolating waters are insufficient

STATE LAWS--Continued

basis for a desert land entry, but such entry may be based on prescriptive rights to percolating waters. In Montana, it does not yet appear that a desert land entry may be allowed if based on percolating waters.

Desert Land Entry Water Rights in California, Colorado, Montana and Oregon, M-36378 (Jan. 19, 1956)

Under California law riparian rights do not attach to public land abutting on a watercourse until title to the land passes into private ownership; until then the occupant of the public land has a right to appropriate water for use on the land.

Under California law an owner of private lands has a correlative and not an appropriative right to the use of percolating water underlying his land, and this right is analogous in many respects to the riparian right of the owner of land abutting on a watercourse.

It is not settled under California law whether an occupant of public land has a correlative right to the use of percolating water underlying the land or only an appropriative right prior to passage of title to the land.

Ruby E. Huffman, Frances Torres, and Beulah Mae Choquette, A-27373 (Mar. 21, 1957) 64 I. D. 57

Disputes as to water rights under State laws are not matters within the jurisdiction of the Department to decide but are matters solely for determination by the State courts.

Hatch Brothers Company, Leland R. Gamble, A-27525 (Jan. 13, 1958)

WILDLIFE REFUGES AND PROJECTS

Act of May 11, 1938 (52 Stat. 345), as amended, did not contemplate that title to Columbia River fishery facilities constructed on State-owned lands would pass to the States.

Ownership of Big Creek Fish Hatchery and Other Facilities, M-36294 (Sept. 12, 1955) 62 I. D. 364

WILDLIFE REFUGES AND PROJECTS--Continued

Administrative withdrawals of public lands for wildlife sanctuaries or refuges in connection with national and international programs are valid.

Validity of Regulations Relating to Oil and Gas Leases on Wildlife Refuges, Game Range and Coordination Lands, M-36519 (July 15, 1958) 65 I. D. 305

The State of Georgia has given qualified consent for the acquisition by the United States of wildlife sanctuaries and other reservations in designated sections of the State. Act of March 30, 1937, Ga. Laws 1937, p. 458. Ga. Code Ann., Tit. 15, sec. 15-304.

The language used in Title 15, section 301 of the Georgia Code of 1933, as amended, is inadequate to constitute State consent to land acquisitions for wildlife purposes as required by the Migratory Bird Conservation Act.

Consent of the State wherein the land lies must be first secured before the Secretary of the Interior may accept a deed or instrument of conveyance of lands acquired under the terms of the Migratory Bird Conservation Act of February 18, 1929, 16 U.S.C., 1952 ed., sec. 715 et seq.

State Consent Necessary in Migratory Bird Conservation Land Acquisitions. State of Georgia Limited Consent, M-36564 (July 27, 1959)

In view of the vesting of title in the State of Alaska to tidal and submerged lands within 3 geographical miles of its coastline under the Submerged Lands Act of 1953, extended to Alaska by section 6(m) of the Statehood Act, the Secretary of the Interior now has no authority to withdraw any portion of those lands for a wildlife refuge.

Authority of the Secretary of the Interior to Withdraw, for a Wildlife Refuge, a Portion of the Tidal and Submerged Lands Within Three Geographical Miles of the Coastline of Alaska, M-36562 (Aug. 21, 1959)

WITHDRAWALS AND RESERVATIONS

GENERALLY

Where the Department of the Air Force exercises for national defense purposes the reversionary clause required by 16 U.S.C. sec. 667b with respect to formerly withdrawn public lands which had been transferred to a State for wildlife purposes under the above statute, the subsequent jurisdiction of that Department rests not upon the former withdrawal, but rather on the exercise of a statutory power. Consequently, reserved nonleasable minerals which had been transferred to the Department of the Interior for administration under the public land laws remain subject to disposal under the Materials Act. (43 U.S.C. sec. 1185.)

Availability of a Non-Leasable Mineral (Tungsten) in Former Ft. Huachuca Military Reservation, Arizona, M-36256 (Jan. 18, 1955)

Solicitor's Opinion M-36254, which held that a patent may be issued to a homestead entryman, which patent excepts oil and gas deposits previously leased but provides that title to such deposits shall vest in the patentee upon termination of the lease, does not constitute a withdrawal of the lands within the meaning of section 17 of the Mineral Leasing Act (30 U.S.C. 226).

Whether Solicitor's Opinion M-36254 (December 28, 1954) Effects a Withdrawal From Oil and Gas Leasing of Lands Disposed of Under a Patent Which (a) Excepts Oil and Gas Deposits Previously Leased but (b) Provides that Title to Such Deposits Shall Vest in the Patentee Upon Termination of the Lease, M-36254 (Supp.) (May 10, 1955) 62 I. D. 177

A mining claim located on land when it was open to mineral location but on which no discovery was made prior to the withdrawal of the land from the operation of the mining laws is not a valid existing right which will be saved from the operation of the withdrawal.

United States v. Wilmot D. Everett et al., A-27010 (Supp.) (Oct. 17, 1955)

Withdrawals and reservations of public lands are within the purview of the President's regulation of August 25, 1941 (6 F. R. 4397, 4407), requiring publication in the Federal Register.

Effective Date of Orders Withdrawing Public Lands for Reclamation Purposes, M-36382 (Oct. 24, 1956)

WITHDRAWALS AND RESERVATIONS--Continued

GENERALLY--Continued

An outstanding lease or a mineral withdrawal are the criteria upon which an absolute mineral reservation is to be made under the act of July 28, 1953. The designation of a known geologic structure of a producing oil or gas field or lands otherwise classified as known to have mineral value does not constitute a "mineral withdrawal" under section 2 of the act of July 28, 1953 (67 Stat. 228, 43 U.S.C. sec. 1068(b) (Supp. III, 1956)).

Appraisals of Mineral Values and Mineral Reservations Under the Act of December 22, 1928 (45 Stat. 1069), as Amended by the Act of July 28, 1953 (67 Stat. 227, 228, 43 U.S.C. secs. 1068 et seq., M-36385 (Nov. 26, 1956)

If a school section reserved for the Territory of Alaska by the act of March 4, 1915 (38 Stat. 1214), is later withdrawn or reserved for governmental or other purposes, under the lieu selection provision of the act, the Territory may select land in lieu of that withdrawn or reserved, provided that the withdrawal or reservation was made under authority of the act of June 25, 1910 (36 Stat. 847), as amended (43 U.S.C. sec. 142), or other statutory authority. It is immaterial whether the withdrawal or reservation is permanent or temporary.

School Sections Reserved for the Territory of Alaska by the act of March 4, 1915 (38 Stat. 1214), as Amended (48 U.S.C. sec. 353), and Lieu Selections Made Under that act, M-36229 (Feb. 4, 1957) 64 I. D. 27

A mining claim is properly declared null and void where the location was made at a time when the land embraced in the claim was included in a proposed withdrawal of the land which would exclude location under the mining laws, and where notice of the proposed withdrawal was recorded on the serial register and tract books of the land office--the notation having the effect of segregating the lands included in the proposed withdrawal from location under the mining laws to the extent that the withdrawal, if effected, would prevent such disposal.

Mrs. Ethel H. Myers, A-27560 (May 5, 1958) 65 I. D. 207

Withdrawals made under the Pickett Act must be within the bounds of a "public purpose," or one of the specified purposes, and the termination of such reservations depends either on an administrative or a congressional revocation.

Validity of Regulations Relating to Oil and Gas Leases on Wildlife Refuges, Game Range and Coordination Lands, M-36519 (July 15, 1958) 65 I. D. 305

WITHDRAWALS AND RESERVATIONS--Continued

GENERALLY--Continued

Where, by act of Congress, all vacant, unreserved, and undisposed of public lands within a described area are permanently withdrawn from all forms of entry or disposal under the public land laws and where the lands are later identified by a survey accepted by the Department, the lands covered by the survey are withdrawn from disposition and applications filed therefor must be rejected, regardless of whether the survey was accurate or inaccurate.

G. E. Kadane & Sons, A-27671 (Oct. 30, 1958) 65 I. D. 446

An attempt to locate a mining claim made while the land is included in an application to withdraw the land from location or entry under the general mining laws for the use of a Federal agency is invalid since the notation of the filing of the application on the land office records segregates the land from lands available for disposal under the public land laws to the extent that the proposed withdrawal would.

The regulation of the Department providing that the notation of the filing of an application for withdrawal shall segregate the land from disposal under the public land laws to the extent that the proposed withdrawal would is a reasonable regulation which is essential to effectuate withdrawals.

Marion Q. Kaiser, Charles C. Kaiser, A-27691 (Nov. 25, 1958) 65 I. D. 485

Where Congress provides for the setting apart of lands for a particular use, any such setting apart is tantamount to a Congressional withdrawal of the lands.

Where lands belonging to the United States are reserved for the use of the United States in carrying out its duties as guardian of the Indians, even though such use is intended to benefit the Indians, the lands are not held in trust for the Indians and are not included in an Indian reservation.

Leasability of Ceded Lands Used by the United States for the Benefit of the Indians, M-36540 (Jan. 8, 1959)

AUTHORITY TO MAKE

The Secretary of the Interior may withdraw after January 25, 1927, a mineral school section unsurveyed at the time of the enactment of the act of January 25, 1927, and title to the section will not pass to the State upon the acceptance

AUTHORITY TO MAKE--Continued

of the plat of survey thereafter so long as the withdrawal is unrevoked.

State of Utah, Kearns Corporation, A-27091 (April 13, 1955) 62 I. D. 141

There is no authority for Executive action which would temporarily withdraw lands within the Papago Indian Reservation from the operation of the mining laws in aid of legislation for the benefit of the Indians, in view of the statutory provision rescinding an earlier withdrawal made for the same purpose, and restoring the lands to exploration and location under the mining laws.

Temporary Withdrawals in Aid of Legislation, M-36277 (April 19, 1955)

When Congress by law limits the right of the locator of a mining claim to the extent necessary to protect Federal improvements previously made on the located land, the Executive branch of the Government is without authority to withdraw the land from location for that purpose.

Conflict of Mining Claims with Existing and Proposed Soil and Moisture Projects, M-36301 (Oct. 20, 1955)

Congress has, by act of June 6, 1900, and subsequent legislation, delegated to and recognized the authority of the Secretary of the Interior to reserve for agency, school, religious and other purposes for the benefit of the Kiowa, Comanche and Apache Tribes, and to retain in accordance with the needs of the Indian service, specific tracts of lands in the reservation set aside for such Indians by Treaty of October 21, 1867.

The Secretary has the responsibility to determine whether such reserved tracts continue to be required for such tribal purposes and to re-designate the purpose of a reservation so made in accordance with the needs of the Indian service.

Where certain Indian tribes or bands have, or appear to have, an interest in such reserved land, approval by such Indians of the disposition thereof, or of a re-designation of the purpose of reservation, should first be obtained.

Status of Lands Reserved for School, Agency, and Cemetery Purposes on Kiowa, Comanche and Apache Reservation in Oklahoma, M-36387 (Dec. 17, 1956)

WITHDRAWALS AND RESERVATIONS--Continued

AUTHORITY TO MAKE--Continued

The Bureau of Land Management is without authority to impose conditions and terms upon its own motion in conditional restoration orders issued under the authority of the act of April 23, 1932 (47 Stat. 136, 137; 43 U.S.C. sec. 154 (1952)), because the powers and duties of final approval of such terms and conditions of restoration have been specifically delegated to the Bureau of Reclamation by 43 CFR 185.36(c), (d) (1954).

Legality of Stipulations Required by the Bureau of Land Management Pursuant to the act of April 23, 1932 (47 Stat. 136, 137; 43 U.S.C. sec. 154 (1952)), Upon the Conditional Restoration of Lands Withdrawn Under the Reclamation Laws to Mineral Location, M-36404 (Jan. 7, 1957)

There is authority under the Coordination Act (when exercised in conjunction with 36 Stat. 847 or the inherent power of the President to withdraw public lands as an aid in conservation) to withdraw public lands to provide access to fish and hunt if such withdrawal is shown to be reasonably conducive to the accomplishment of the purposes of that act.

Withdrawal for Access Purposes Under the Coordination Act (60 Stat. 1080; 16 U.S.C. secs. 661-666c), M-36442 (July 9, 1957)

Public lands may be withdrawn under the Fish and Wildlife Coordination Act, as amended, to provide public fishing areas (Public Law 624, 85th Cong., 2d sess., H. R. 13138).

Withdrawal for Fishing Areas Under the Fish and Wildlife Coordination Act, M-36526 (Sept. 4, 1958)

The filing of an application for a sodium prospecting permit does not confer upon the applicant an interest in the lands designated therein which defeats a subsequent withdrawal of the land before the issuance of the permit to him.

Byard C. Wilburn, A-27675 (Sept. 18, 1958)

Public lands may be withdrawn as a conservation measure under the Coordination Act to afford public access to hunting and fishing areas.

Withdrawal for Access Purposes Under the Coordination Act (60 Stat. 1080; 16 U.S.C. sec. 661 et seq.), M-36532 (Sept. 19, 1958)

WITHDRAWALS AND RESERVATIONS--Continued

AUTHORITY TO MAKE--Continued

The Secretary of the Interior has authority, under section 4 of the act of March 3, 1927, to withdraw lands temporarily in aid of proposed legislation for the benefit of Indians and to place those withdrawn lands under the administration of the Commissioner of Indian Affairs.

Betty Ruth Wright et al., A-27519 (Nov. 14, 1958)

The act of June 25, 1910, authorizes the withdrawal and reservation of public lands in Alaska for purposes of classification.

Eugene T. Meyer, A-27729 (Dec. 17, 1958)

Where Congress provides for the setting apart of lands for a particular use, any such setting apart is tantamount to a Congressional withdrawal of the lands.

Leasability of Ceded Lands Used by the United States for the Benefit of the Indians, M-36540 (Jan. 8, 1959)

The act of June 25, 1910, authorizes the withdrawal and reservation of public lands in Alaska for purposes of classification.

Lewis Sanford Cass, A-27742 (Jan. 14, 1959)

In view of the vesting of title in the State of Alaska to tidal and submerged lands within 3 geographical miles of its coastline under the Submerged Lands Act of 1953, extended to Alaska by section 6(m) of the Statehood Act, the Secretary of the Interior now has no authority to withdraw any portion of those lands for a wildlife refuge.

Authority of the Secretary of the Interior to Withdraw, for a Wildlife Refuge, a Portion of the Tidal and Submerged Lands Within Three Geographical Miles of the Coastline of Alaska, M-36562 (Aug. 21, 1959)

EFFECT OF

Executive Order No. 5214 which withdrew lands in Alaska for the exclusive use and benefit of the Navy Department for naval purposes is properly interpreted as not by itself prohibiting the leasing of the withdrawn lands under the Mineral Leasing Act.

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

In general, unless the Mineral Leasing Act or a withdrawal or reservation specifically provides otherwise, lands withdrawn or reserved for a specific purpose are available for leasing under the Mineral Leasing Act, if the issuance of a lease will not be inconsistent with or materially interfere with the purposes for which the land is withdrawn or reserved.

Noel Teuscher et al., A-27099, A-27104, A-27192 (May 31, 1955) 62 I. D. 210

Metalliferous mining locations could be made within petroleum reserves prior to the act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 181), even if the land was then known to contain oil or gas. After that enactment and prior to the enactment of the acts of August 12, 1953 (Public Law 250; 67 Stat. 539), and August 13, 1954 (Public Law 585; 68 Stat. 708), lands valuable for oil or gas were not subject to location under the United States mining laws. But only lands known to contain those minerals were excluded from location for metalliferous minerals.

Metalliferous Mining Locations Within a Petroleum Reserve, M-36375 (May 3, 1956) 63 I. D. 346

Land reserved "for government and school purposes" and included in the schedule of allotments to individual Indians of the Tonkawa Tribe as a supplemental schedule, is excepted from the land ceded by the Tonkawa Tribe by Agreement of October 21, 1891, which specifically incorporates such schedule thereinto; and the act of Congress of March 3, 1893 (27 Stat. 644), accepting, confirming and ratifying that agreement, determines the right of the Tonkawas to such excepted land.

Title to Land Reserved for Government and School Purposes on the Tonkawa Reservation, Oklahoma, M-36353 (June 26, 1956)

Withdrawals and reservations are complete upon execution of the withdrawal order by the proper officer or officers. Such orders are effective to constitute valid notice as to persons without actual knowledge thereof from and after the required copies of the withdrawal document are filed with the Division of the Federal Register, National Archives, and made available for public inspection. (Section 7, Federal Register Act; 44 U.S.C. sec. 307.) As to persons with

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

earlier actual knowledge of the withdrawal, the order is effective from the time of such prior actual notice.

Effective Date of Orders Withdrawing Public Lands for Reclamation Purposes, M-36382 (Oct. 24, 1956)

To hold that section 2 of the act of March 4, 1931 (46 Stat. 1547), revoked the power site reserve would run counter to the long line of decisions which follow the rule announced in Wilcox v. Jackson, 13 Pet. 498.

Effect of Section 2 of the Act of March 4, 1931 (46 Stat. 1547), Upon the Right to Locate Non-Metalliferous Minerals Within Power Site Reserve No. 696, M-36453 (Aug. 15, 1957)

The Executive Order of November 11, 1907, withdrawing certain lands for Indian purposes and containing a proviso that "this withdrawal shall not affect any existing valid rights of any party" applied to lands owned by the Territory of New Mexico at the date the order was signed but which thereafter became public lands of the United States.

Availability for Leasing of Certain Lands on the Jicarilla Apache Indian Reservation, M-36507 (Mar. 14, 1958) (Memorandum from Regional Solicitor, Denver, Colorado, to State Supervisor, Bureau of Land Management, Santa Fe, New Mexico.)

Where land included in a homestead entry is described among lands withdrawn by a withdrawal order issued under the act of June 25, 1910, the withdrawal attaches to the land upon cancellation of the homestead entry.

Walter Pedersen, A-27734 (Dec. 17, 1958)

Section 6 of the act of February 28, 1958, does not give the Secretary of the Interior authority to issue oil and gas leases, with the concurrence of the Secretary of Defense, on lands in existing withdrawals which expressly prohibit mineral leasing.

B. L. Haviside, Jr., A-27932 (July 21, 1959) 66 I. D. 271

Where lands have been withdrawn or reserved for the use of any agency of the Department of Defense, they are not subject to leasing under the terms of the Mineral Leasing Act without the consent of the Secretary of Defense.

H. T. Birr, III, et al., A-27947 (Jul. 23, 1959)

WITHDRAWALS AND RESERVATIONS--Continued

EXECUTIVE ORDER 6910

Land which was covered by a stock-driveway withdrawal between 1920 and 1943, and thereafter included in the first general withdrawal of November 26, 1934, by Executive Order No. 6910 was not subject to a settlement claim in 1934 or thereafter, but the land may be included in an application for enlarged homestead entry, and, if suitable, opened for such entry under section 7 of the Taylor Grazing Act.

Conrad J. Yede, A-27534 (Jan. 24, 1958)

POWER SITES

Where it appears from the records of the Department that land embraced in a power site withdrawal created by the President under the act of June 25, 1910, may have been erroneously withdrawn or is without value for power site purposes, and an application for the public sale of such land is filed, a field examination of the land will be ordered to determine if such is the case, and, if so, consideration will be given to a revocation of the withdrawal so as to open the lands for disposal at public sale. If the land is determined to be valuable for a power site, the applicant can seek to have the land restored for disposition pursuant to section 24 of the Federal Power Act, subject to the conditions therein stated.

A power site withdrawal made by the President in 1917 pursuant to the authority contained in section 1 of the act of June 25, 1910, can now be revoked by the President (or the Secretary of the Interior under a delegation of authority from the President) under the authority of that act, despite the intervening passage of the Federal Water Power Act of June 10, 1920.

Weyerhaeuser Timber Company, A-27137 (Aug. 11, 1955) 62 I. D. 305

A mineral location made on land included within a power site reserve confers no rights upon the locator or his successor in interest.

John Rovetto, A-27521 (Dec. 9, 1957)

Determinations by the Federal Power Commission that the power values of certain school sections will not be injured or destroyed by "location, entry, or selection" under the public land laws, subject to the provisions of section

WITHDRAWALS AND RESERVATIONS--Continued

POWER SITES--Continued

24 of the Federal Power Act, followed by a public land order modifying the powersite reservations, withdrawals or classifications for the purpose of allowing the grants made to the State of Utah by either the act of July 16, 1894 (28 Stat. 107), or the act of January 25, 1927 (44 Stat. 1026; 43 U. S. C. sec. 870), to attach, would be ineffective to accomplish that purpose. There is no authority of law for burdening such grants with the conditions and limitations of section 24 of the Federal Power Act.

Proposed Modifications of Powersite Reservations, Withdrawals and Classifications so as to Permit the Grants of School Sections Made to the State of Utah by Either the Act of July 16, 1894 (28 Stat. 107), or the Act of January 25, 1927 (44 Stat. 1026; 43 U. S. C. sec. 870), to Attach, Subject to the Provisions of Section 24 of the Federal Power Act, M-36484 (Dec. 26, 1957)

The act of August 11, 1955 (69 Stat. 681; 30 U. S. C. secs. 621-625), requiring that a copy of a location notice be filed for record in the land office, contemplates an instrument which describes the land and where under State law the location notice is not required to do so but the location certificate is required to do so, a copy of the location certificate, duly filed, meets the intent of the law.

Where an act, in apparently mandatory language, requires the filing of a location notice for record within 60 days after the date of location of land in a power site reserve, it is competent to examine the legislative history to see if it supports the conclusion that it was intended to make the requirement a mandatory one. The acceptance by Congress of the administrative determination of language by the agency designated to administer the law if enacted and the enactment of the bill without change in the language or evidence of an intent to have the language construed otherwise is persuasive that it should be construed as mandatory.

Mineral Locations on Power Site Withdrawals--Act of August 11, 1955 (69 Stat. 681; 30 U. S. C. Secs. 621-625), M-36468 (Mar. 6, 1958)

Prior to passage of the act of August 11, 1955, lands embraced in an existing power-site withdrawal were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power-site purposes, but prior to passage of the act, is null and void where the land embraced in the claim had not been restored to entry under section 24 of the Federal Power Act at the time of location.

Day Mines, Inc., A-27553 (Mar. 28, 1958) 65 I. D. 145

WITHDRAWALS AND RESERVATIONS--Continued

POWER SITES--Continued

The act of August 11, 1955, the Mining Claims Rights Restoration Act of 1955, did not open to mining location land which was previously withdrawn or reserved for power development or power sites and which, in addition, was withdrawn for reclamation purposes.

Mining claims located on land withdrawn for power site purposes are null and void where such locations were made prior to the act of August 11, 1955.

A. W. Kimball et al., A-27526 (Apr. 21, 1958) 65 I. D. 166

Prior to passage of the act of August 11, 1955, lands embraced in power site withdrawals were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power site purposes but prior to passage of the act of August 11, 1955, is null and void unless the land embraced in the claim was restored to entry under section 24 of the Federal Power Act at the time of location.

Mrs. Ethel H. Myers, A-27560 (May 5, 1958) 65 I. D. 207

A determination by the Federal Power Commission that the value of lands withdrawn under section 24 of the Federal Power Act for power-site purposes will not be injured or destroyed by entry under the public land laws does not of itself restore the land to entry under the Small Tract Act, and until such time as the land is restored to entry a small tract application for the land must be rejected.

Joel F. and Celia Mae Swank, A-27638 (Aug. 7, 1958)

Lands in power site withdrawals were not open to location of mining claims until the adoption of the Mining Claims Rights Restoration Act of 1955 on August 11, 1955, and any attempted location before that time subsequent to the withdrawal of the land for power site purposes is null and void.

Marion Q. Kaiser, Charles C. Kaiser, A-27691 (Nov. 25, 1958) 65 I. D. 485

A mining claim which is null and void at its inception because the land is embraced in an existing power-site withdrawal cannot subsequently be validated as of the date of the original location by relocation after the land is opened to mining location under section 24 of the Federal Power Act.

POWER SITES--Continued

The act of August 11, 1955, does not operate retroactively to validate mining claims which were void at their inception nor to permit retroactive relocation of claims which were void because the lands included therein were withdrawn for a power site at the time of the original location.

Howard W. Balsley, A-27920 (Jun. 15, 1959)

The dismissal of a protest against the conditional allowance of a placer mining claim under the act of August 11, 1955, is proper where the evidence supports the conclusion that placer mining operations would not substantially interfere with other uses of the land included within the placer claim.

Pacific Gas And Electric Company et al., A-27934 (July 20, 1959) 66 I. D. 264

RECLAMATION WITHDRAWALS

The concurrence of the Bureau of Land Management is an essential antecedent to an effective withdrawal by the Commissioner of Reclamation, of public lands for reclamation purposes under the Reclamation Act of 1902. (Departmental Order No. 2765, July 30, 1954.)

Effective Date of Orders Withdrawing Public Lands for Reclamation Purposes, M-36382 (Oct. 24, 1956)

Any distinction between forms of reclamation withdrawals, founded on entry requirements, prevailing under sections 3 and 5 of the act of June 17, 1902 (32 Stat. 388, 389), could not be made after June 25, 1910.

Forms of withdrawal were an administrative interpretation of the 1902 act. Since the procedure for entry was modified by the operation of section 5 of the act of June 25, 1910 (36 Stat. 835), the original distinction drawn by the Department largely lost its pertinence. There has been complete abandonment of the use of the second form of withdrawal by the Bureau of Reclamation.

Disposal of Land--Guernsey Reservoir, North Platte Project, M-36433 (Apr. 12, 1957)

RECLAMATION WITHDRAWALS--Continued

A petition for the restoration to mineral entry of land withdrawn for reclamation purposes and as a part of the Imperial National Wildlife Refuge is properly denied where mining operations would interfere with the purposes for which the land was withdrawn.

Clyde A. Morgan, Walter F. Sager, A-27489 (Oct. 24, 1957)

The act of August 11, 1955, the Mining Claims Rights Restoration Act of 1955, did not open to mining location land which was previously withdrawn or reserved for power development or power sites and which, in addition, was withdrawn for reclamation purposes.

A. W. Kimball et al., A-27526 (Apr. 21, 1958) 65 I. D. 166

REVOCATION AND RESTORATION

Public lands that were withdrawn and permanently reserved pursuant to act of Congress for schools, hospitals, and other purposes necessary for administration of affairs of Natives of Alaska may either be sold under the provisions of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377, 40 U.S.C. 471 et seq.), or restored to the public domain for disposition under the public land laws.

Authority to Revoke a Permanent Reservation Made Under the Act of May 31, 1938 (52 Stat. 593; 48 U.S.C. 353a), M-36248 (Jan. 17, 1955)

Where an order revoking a withdrawal of land specifies that the revocation shall not be effective to change the status of a part of the land affected by the revocation until a future date, that part of the land is not available for oil and gas leasing until that future date.

Mary E. Brown, A-27072 (Mar. 23, 1955) 62 I. D. 107

A power site withdrawal made by the President in 1917 pursuant to the authority contained in section 1 of the act of June 25, 1910, can now be revoked by the President (or the Secretary of the Interior under a delegation of

authority from the President) under the authority of that act, despite the intervening passage of the Federal Water Power Act of June 10, 1920.

Weyerhaeuser Timber Company, A-27137 (Aug. 11, 1955) 62 I. D. 305

A veteran who requests the revocation of an order of withdrawal is not by virtue of his request entitled to a preference right of entry over other veterans in the event that the withdrawal is revoked.

Alma Everett Morris, Jr., et al., A-27235 (Dec. 12, 1955)

Where an order opening land for disposition under the public land laws provides that commencing on the 126th day after the date of the order the land shall be subject to nonpreference-right applications and provides that all such applications filed on or before the 126th day after the date of the order are to be treated as simultaneously filed, applications may be filed at any time after the date of the order.

Rachael S. Preston, A-27174 (Feb. 6, 1956) 63 I. D. 40

Where a public land order revoking a prior withdrawal states that a part of the land restored shall not be subject to the initiation of any rights or any disposition under the public land laws until so provided by a classification order, and no such order has been issued, an application to enter the lands under the Small Tract Act is properly rejected.

John Francis Ruby, A-27301 (May 4, 1956)

The Bureau of Land Management is without authority to impose conditions and terms upon its own motion in conditional restoration orders issued under the authority of the act of April 23, 1932 (47 Stat. 136, 137; 43 U.S.C. sec. 154 (1952)), because the powers and duties of final approval of such terms and conditions of restoration have been specifically delegated to the Bureau of Reclamation by 43 CFR 185.36(c), (d) (1954).

Legality of Stipulations Required by the Bureau of Land Management Pursuant to the act of April 23, 1932 (47 Stat. 136, 137; 43 U.S.C. sec. 154 (1952)), Upon the Conditional Restoration of Lands Withdrawn Under the Reclamation Laws to Mineral Location, M-36404 (Jan. 7, 1957)

Where a petition for the restoration from withdrawal of certain lands as oil shale lands is rejected by the Bureau of Land Management on the basis of a determination that the land is properly classified as oil shale in character by the Geological Survey, and the Geological Survey subsequently determines that a portion of the land is not oil shale in character, the case will be remanded to the Bureau for action looking to the allowance of the petition as to this land.

Where a legal subdivision has been withdrawn as oil shale land and only part of the subdivision is determined to be oil shale land, the remainder of the subdivision will not be restored from the withdrawal in view of the established practice not to dispose of public lands in less than smallest legal subdivisions.

Rea L. Eaton, A-27377 (Mar. 18, 1957)

A petition for the restoration to mineral entry of land withdrawn for reclamation purposes and as a part of the Imperial National Wildlife Refuge is properly denied where mining operations would interfere with the purposes for which the land was withdrawn.

Clyde A. Morgan, Walter F. Sager, A-27489 (Oct. 24, 1957)

Neither the Atomic Energy Act of 1946 nor the Atomic Energy Act of 1954 restored to the operation of the mining laws lands previously reserved or withdrawn from the operation of those laws.

A. W. Kimball et al., A-27526 (Apr. 21, 1958) 65 I. D. 166

Where the Commissioner of Reclamation revokes a reclamation withdrawal under authority delegated by the Secretary of the Interior which delegation of authority requires the concurrence by the Bureau of Land Management in the action taken by the Commissioner of Reclamation, the land remains withdrawn until that concurrence is given and applications for homestead entries on the land must be rejected.

Roy B. Stephenson, A-27637 (Aug. 7, 1958)

The signing of a revocation order by the Commissioner of Reclamation under authority delegated by the Secretary of the Interior, which delegation requires concurrence by the Bureau of Land Management, does not effect a

WITHDRAWALS AND RESERVATIONS--Continued

REVOCATION AND RESTORATION--Continued

revocation of a reclamation withdrawal until such concurrence is given and applications for homestead entry on the withdrawn land must be rejected.

George Francis Walters, A-27798 (Dec. 23, 1958)

Each order of revocation of withdrawn lands shall provide a preference right period to the State of not less than 6 months before the order would otherwise become effective, to select the restored lands as indemnity for deficient school lands, which preference right shall be superior to the preference right granted under the Veterans' Preference Act of 1944, as amended (43 U. S. C., sec. 282).

Applicability of the Act of August 27, 1958 (P. L. 85-771; 72 Stat. 928) upon Restoration to Entry of Lands Acquired by the United States by Exchange under Section 8 of the Taylor Grazing Act, M-36558 (Apr. 9, 1959)

The legislative history of section 20 of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), makes it clear that the act revoked the withdrawals of coal land made under authority of section 2 of the act of October 20, 1914 (38 Stat. 742; 48 U.S.C., sec. 433).

Proposed Public Land Order Opening Coal Reserves in Alaska, M-36572 (Aug. 20, 1959)

The mere fact that land in a stock-driveway withdrawal may have been abandoned for use as a driveway does not operate to revoke the withdrawal and to open the land to homestead application.

Bessie S. Lynn, A-28055 (Oct. 12, 1959)

STOCK-DRIVEWAY WITHDRAWALS

Land which is within a stock-driveway withdrawal is not subject to desert land entry.

Len Everett, A-27050 (Mar. 23, 1955)

WITHDRAWALS AND RESERVATIONS--Continued

STOCK-DRIVEWAY WITHDRAWALS--Continued

Land which was covered by a stock-driveway withdrawal between 1920 and 1943, and thereafter included in the first general withdrawal of November 26, 1934, by Executive Order No. 6910 was not subject to a settlement claim in 1934 or thereafter, but the land may be included in an application for enlarged homestead entry, and, if suitable, opened for such entry under section 7 of the Taylor Grazing Act.

Conrad J. Yede, A-27534 (Jan. 24, 1958)

The mere fact that land in a stock-driveway withdrawal may have been abandoned for use as a driveway does not operate to revoke the withdrawal and to open the land to homestead application.

Bessie S. Lynn, A-28055 (Oct. 12, 1959)

TEMPORARY WITHDRAWALS

A petroleum reserve created by a withdrawal made under and pursuant to the provisions of the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497; 43 U.S.C. secs. 141, 142), is a temporary withdrawal which, in and of itself, does not prevent the location of mining claims for metalliferous minerals.

Metalliferous Mining Locations Within a Petroleum Reserve, M-36375 (May 3, 1956) 63 I. D. 346

Temporary withdrawals made by the Secretary of the Interior in aid of proposed legislation for the benefit of Indians remain in force until revoked either by the Congress or by the Secretary of the Interior.

The Secretary of the Interior has authority, under section 4 of the act of March 3, 1927, to withdraw lands temporarily in aid of proposed legislation for the benefit of Indians and to place those withdrawn lands under the administration of the Commissioner of Indian Affairs.

Betty Ruth Wright et al., A-27519 (Nov. 14, 1958)

WORDS AND PHRASES

Adjoining lands. The term "contiguous land" used in the first proviso of section 2455 of the Revised Statutes, as amended, does not include "cornering" lands, since in the administration of the public land laws the terms "contiguous" or "adjoining" lands have been consistently defined and construed to exclude "cornering" lands.

Henry Petz, Mary B. Wilson, Administratrix of the Estate of Frank H. Wilson, A-27017 (Feb. 11, 1955) 62 I. D. 33

Adult. Since section 2(e) of the act of August 13, 1954 (68 Stat. 718), defines "adult" for the purposes of that act as "a member of the tribe who has attained the age of twenty-one years," married women or emancipated minors under the age of 21 may not be considered adults for the purposes of that act even though they may be "adults" under State law.

Klamath Terminal Legislation, M-36284 (May 20, 1955) 62 I. D. 186

All members of said tribe who are residents of the Cheyenne River Sioux Reservation at the time of the passage of this Act. The phrase "all members of said tribe who are residents of the Cheyenne River Sioux Reservation at the time of the passage of this Act," means those members of the tribe who actually resided on the reservation and maintained their homes there to the exclusion of members of the tribe who maintain permanent residence elsewhere.

Interpretation of the Cheyenne River Act of September 3, 1954 (68 Stat. 1191), M-36323 (Jan. 12, 1956) 63 I. D. 7

Capital assets. The term "capital assets" as used in Indian corporate charters (25 U. S. C., 1952 ed., sec. 477) may ordinarily be construed as similar to "fixed assets" which are those held for the purpose of conducting the business undertaken by the corporation in contradistinction to those assets which are destined to be converted into cash or continuously disposed of in the ordinary course of business.

Timber as a Capital Asset of the Blackfeet Tribe, M-36545 (Dec. 16, 1958)

Commensurability. "Commensurability," as used in connection with the Federal Range Code, refers to the number of livestock which can be properly supported for a designated period of time from the forage and feed produced on dependent base property.

Arthur V. Heller, A-27833 (Mar. 9, 1959) 66 I. D. 65

WORDS AND PHRASES--Continued

Contiguous. The word "contiguous" as used in the public land laws means "adjoining" or "abutting," and lands which do not actually come in physical contact with one another are not "contiguous."

Mrs. M. H. Wildermuth, A-27409 (Jan. 30, 1957)

Contiguous lands. The term "contiguous land" used in the first proviso of section 2455 of the Revised Statutes, as amended, does not include "cornering" lands, since in the administration of the public land laws the terms "contiguous" or "adjoining" lands have been consistently defined and construed to exclude "cornering" lands.

Henry Petz, Mary B. Wilson, Administratrix of the Estate of Frank H. Wilson, A-27017 (Feb. 11, 1955) 62 I. D. 33

Cultivation. As used in the desert land law, cultivation of land means tillage, which is "the operation, practice, or act of tilling or preparing land for seed, and keeping the ground in a state favorable for the growth of crops." Because the cultivation of desert land without irrigation would be a useless proceeding, the irrigation of such land is required as an attendant act.

Claude E. Crumb, A-26930 (Mar. 21, 1955) 62 I. D. 99

Development or utilization of natural resources. Under the act of August 14, 1955 (69 Stat. 725), the phrase "development or utilization of natural resources" cannot be construed to authorize the granting of mining or oil and gas leases. Interpreting the language of the act as a whole, natural resource development is involved only insofar as it is done to implement any of the purposes for which leases may be granted as specified therein.

Mining Leases on Unassigned Lands Located on the Colorado River Reservation, M-36327 (Jan. 19, 1956)

Diligent drilling operations. The phrase "diligent drilling operations" in the second paragraph of section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946, cannot be construed as having the same meaning as "reworking operations" inasmuch as the common usage of the expression "drilling operations" is in reference to the act of digging or deepening a well, whereas "reworking operations" refer to efforts to restore production such as repairing, swabbing, bailing, etc.

Morton Oil Company, A-27392 (Nov. 26, 1956) 63 I. D. 392

WORDS AND PHRASES--Continued

Effective as of the date of its filing. The phrase "effective as of the date of its filing" in section 30(b) of the Mineral Leasing Act, providing that a relinquishment of an oil and gas lease "shall be effective as of the date of its filing," means that a relinquishment is effective to terminate the lease from the first instant of the day upon which it is filed, and is not effective merely from the time it is filed on that day.

Humble Oil & Refining Company, A-27363 (Jan. 30, 1957) 64 I. D. 5

Federal instrumentality. "Federal instrumentality" as used in the act of June 14, 1926, as amended (43 U. S. C. sec. 869), means only such a Federal instrumentality as is authorized by law to acquire and hold title to public land, or to lease it, in its own name rather than in the name of the United States.

School Sections Reserved for the Territory of Alaska by the act of March 4, 1915 (38 Stat. 1214), as Amended (48 U. S. C. sec. 353), and Lieu Selections Made Under that act, M-36229 (Feb. 4, 1957) 64 I. D. 27

Homestead laws. The words "homestead laws" as used in the act of March 31, 1950 (64 Stat. 39; 43 U. S. C., 1952 ed., sec. 375b-375f) do not include the stockraising homestead laws.

Mineral Reservations in Patents to be Issued Under the Act of March 31, 1950 (64 Stat. 39; 43 U. S. C., 1952 ed., sec. 375b-375f), M-36583 (Sept. 29, 1959)

Individual. Each spouse of a married couple, if otherwise qualified, may be considered as an "individual" within the meaning of the 1954 amendment to section 1 of the Small Tract Act, and, in the absence of other objection, each may apply for a small tract or enter into an appropriate drawing for a small tract.

Preference Right of Veteran and Spouse; Small Tract Act (43 U. S. C. sec. 682a-e), as Amended, M-36427 (Feb. 19, 1957)

Irrigation. As used in the desert land law, irrigation means the application of water to land.

Claude E. Crumb, A-26930 (Mar. 21, 1955) 62 I. D. 99

WORDS AND PHRASES--Continued

Known Geological Structure. The known geological structure of a producing oil and gas field is the trap, whether structural or stratigraphic, in which an accumulation of oil and gas has taken place and the limits of the structure are the known or inferred limits of the trap.

Karl Bruesselbach, A-28061 (Oct. 26, 1959)

"Newspaper of general circulation" defined and language of opinion M-36497 of January 21, 1958 /unreported/ explained.

Forms for Service by Publication, M-36497 (Supp.), (June 11, 1958)

One person. A husband and wife are not, by reason of their marital relationship alone, "one person" within the meaning of the limitation in section 1 of the Small Tract Act that no person shall be permitted to purchase or lease more than one small tract except upon a showing of good faith and reasons satisfactory to the Secretary; but each spouse must be regarded as an individual person under this limitation.

Preference Right of Veteran and Spouse; Small Tract Act (43 U. S. C. sec. 682a-e), as Amended, M-36427 (Feb. 19, 1957)

Otherwise appropriated. "Otherwise appropriated" as used in the lieu selection provision of the act of March 4, 1915 (38 Stat. 1214), includes governmental withdrawals or reservations.

School Sections Reserved for the Territory of Alaska by the act of March 4, 1915 (38 Stat. 1214), as Amended (48 U. S. C. sec. 353), and Lieu Selections Made Under that act, M-36229 (Feb. 4, 1957) 64 I. D. 27

Public buildings and Public works. The words "public buildings" and "public works," not otherwise defined in the Public Works Act of 1954 (68 Stat. 1146; 43 U. S. C. secs. 931c, 931d), should be given their ordinary meanings consistent with the purposes of that act, not excluding suitable recreational facilities which an applicant is authorized to construct.

Public lands. The term "public lands" as used in the Public Works Act of September 3, 1954 (68 Stat. 1146; 43 U. S. C. secs. 931c, 931d), may be given a broader construction, as including the O & C lands. Such construction is

limited, however, to the use of that term in the context and for the purposes of the Public Works Act.

Applicability to O & C Lands, of the Public Works Act of September 3, 1954 (68 Stat. 1146; 43 U. S. C. Secs. 931c, 931d), M-36494 (Mar. 18, 1958)

Public purpose. The acquisition of land by a municipality to be set apart and leased for private industrial development is not generally recognized as a responsibility and function of a municipality as such, and does not constitute a "public purpose" for which municipalities are normally organized and established, notwithstanding the ulterior motivation behind such acquisition is the incidental enhancement of the local economy due to the industrial development.

Interpretation of "Public Purposes" Under the Recreation and Public Purposes Act of 1954 (43 U. S. C. Supp. III, Secs. 869 to 869-3), M-36390 (Nov. 20, 1956)

Reclamation. As used in the desert land law, reclamation of land is interpreted to mean conducting water in adequate supply to the land so as to render it available for distribution when needed.

Claude E. Crumb, A-26930 (Mar. 21, 1955) 62 I. D. 99

Rights-of-way for all purposes. The act of February 5, 1948 (62 Stat. 17; 25 U.S.C. sec. 323), providing for "rights-of-way for all purposes" over and across Indian lands applies to sites for all features and facilities, including dams, reservoirs, powerplants, and construction and operating camps, appropriate to water control projects undertaken by the United States.

Utilization of Lands in the Navajo Indian Reservation for Glen Canyon Dam and Reservoir, M-36395 (Mar. 22, 1957) 64 I. D. 70

Service. "Service" on a person or on his authorized representative means the delivery or communication of a notice or other paper in a proceeding in such a manner as legally to charge the party who is served with notice of receiving it.

United States v. Bunno E. Matsen, A-27712 (Nov. 10, 1958) 65 I. D. 453

Subsurface rights. The term "subsurface rights" as used in section 8(b) of the act of August 13, 1954 (68 Stat. 718), does not include water rights.

Klamath Terminal Legislation, M-36284 (May 20, 1955) 62 I. D. 186

True cardinal direction. A "true cardinal direction" is a description such as north, south, east, or west.

George Sabolsice, A-27548 (May 23, 1958)

Valid existing rights and claims. A mere application under the Timber and Stone Act does not constitute either a valid existing right or claim within the meaning of those terms as used in the act of August 1, 1955, repealing the Timber and Stone Act.

Roy Francis Nesbit, A-27331 (June 18, 1956)

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